TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 188.

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

vs.

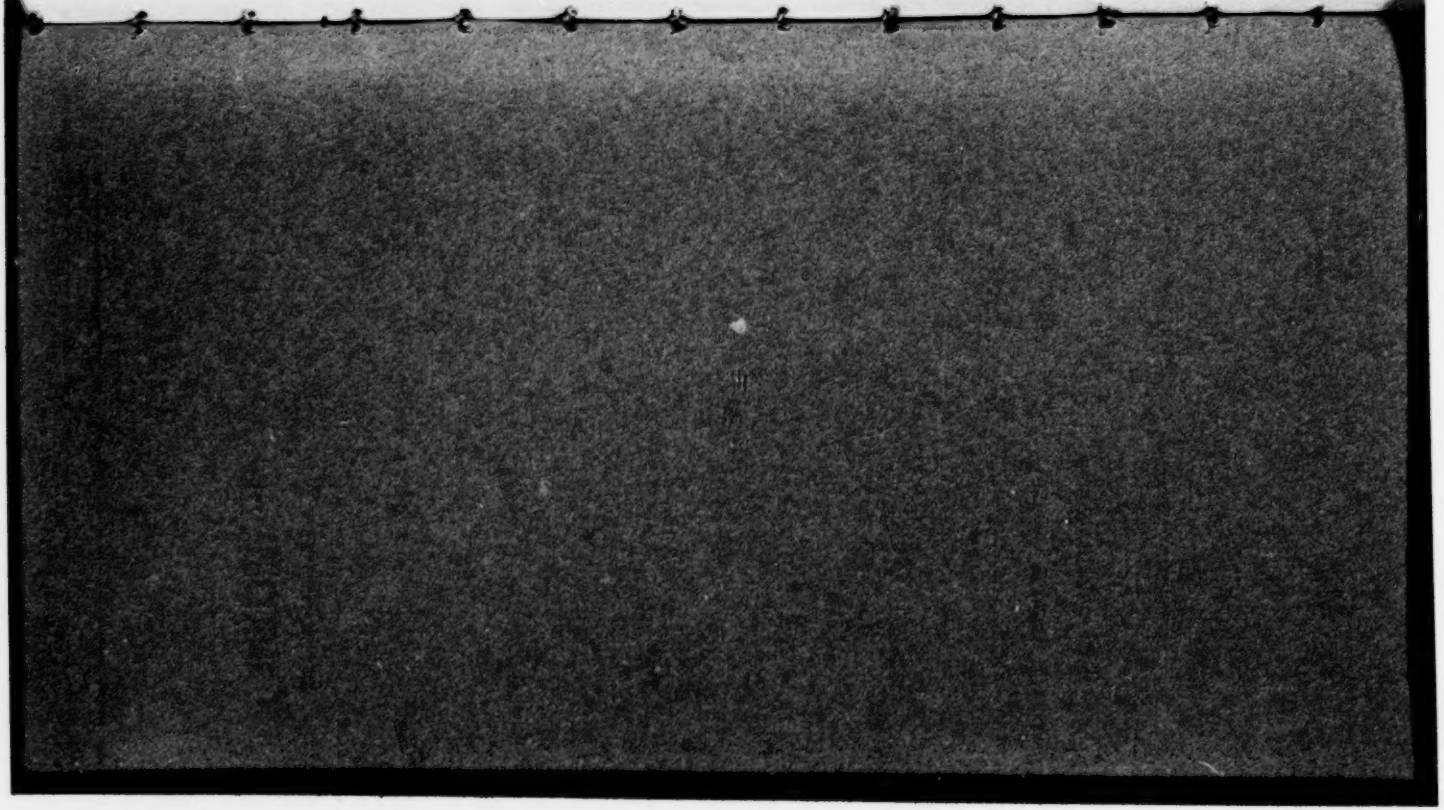
A. J. LINDENBURG.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

PETITION FOR CERTIORARI FILED AUGUST 2, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 6, 1922.

(26,406)



(28,406)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 451.

AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER,

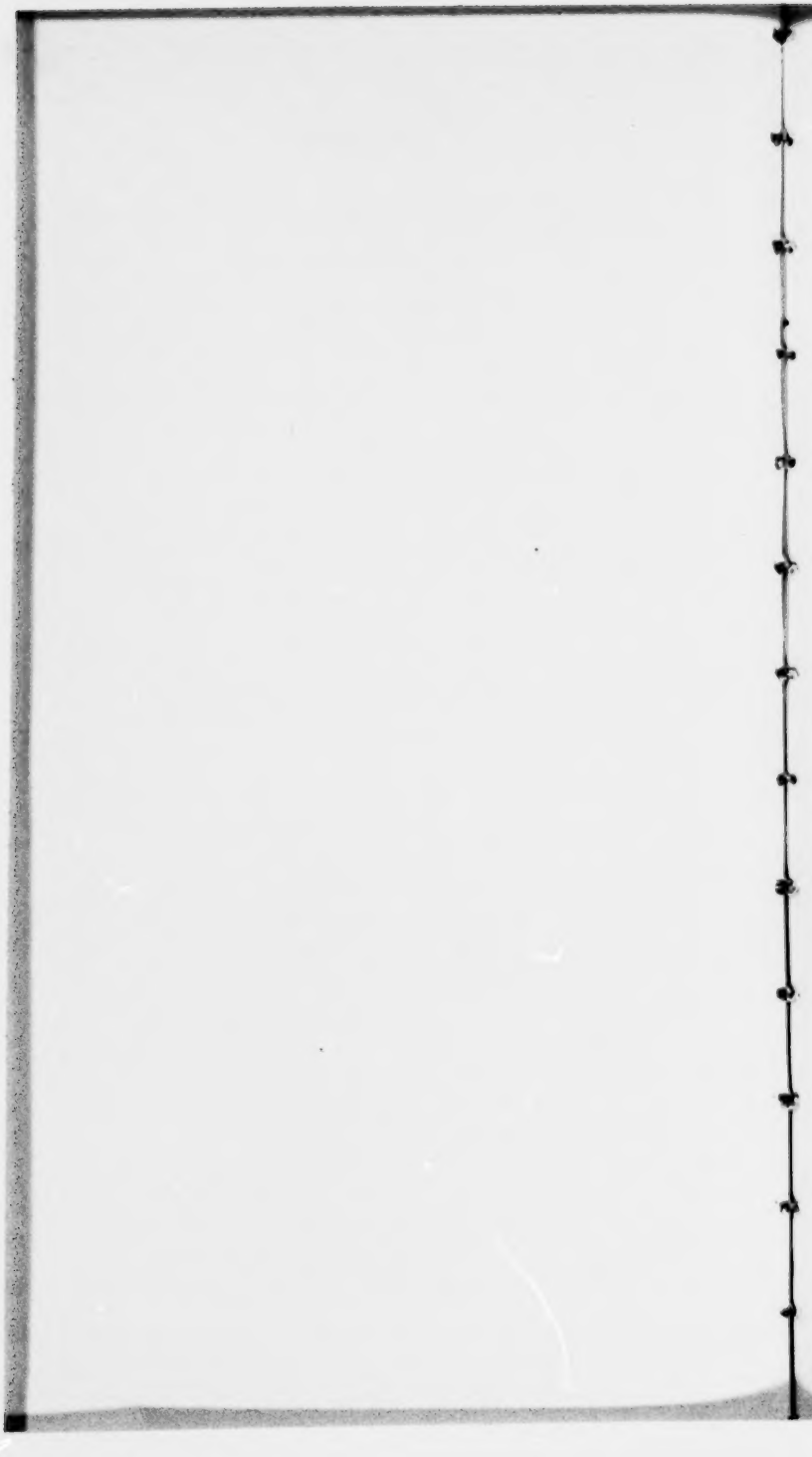
vs.

A. J. LINDENBURG.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1921.



a Pleas Before the Supreme Court of Appeals of the State of West Virginia.

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on Friday, the 12th day of November, 1920, the following order was made and entered, towit:

Absent: Judge Williams.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

This day came the American Railway Express Company, by Davis & Davis, its attorneys, and presented to the Court a petition praying for a writ of error and supersedeas to a judgment of the Circuit Court of Kanawha County, rendered on the 15th day of October, 1920, in a case in which A. J. Lindenburg was plaintiff and said petitioner was defendant, with a record of the judgment aforesaid accompanying the petition, which being seen and inspected by the Court, the writ of error and supersedeas prayed for is granted, but the same is not to take effect until the petitioner, or some person or persons for it, shall have given, before the Clerk of the Circuit Court of Kanawha County, bond with good personal security in the penalty of Fifteen Hundred Dollars, conditioned according to law.

The petition and record aforesaid are in the words and figures following:

b Filed Jan. 21, 1921. Wm. B. Mathews, Clerk of the Supreme Court of Appeals.

In the Supreme Court of Appeals of West Virginia, Charleston.

No. 4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

Writ of Error and Supersedeas Granted November 12, 1920.

Judgment Rendered October 15, 1920.

From the Circuit Court of Kanawha County,

Judges:

Hon. Harold A. Ritz, President.
Hon. George Poffenbarger.
Hon. William N. Miller.
Hon. Charles W. Lynch.
Hon. Frank Lively.

William B. Mathews, Clerk.

1921.

1 In the Supreme Court of Appeals of West Virginia, Charleston.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Defendant Below, Plaintiff in Error.

From the Circuit Court of Kanawha County.

Petition.

Your petitioner, American Railway Express Company, a corporation, respectfully represents unto your Honors that it is aggrieved by the judgment of the Circuit Court of Kanawha County rendered against it on the 15th day of October, 1920, in an action at law therein pending in which A. J. Lindenburg was plaintiff and your petitioner was defendant.

A duly certified copy of the record in said case is herewith filed as a part hereof, and prayed to be taken and read as a part of this petition.

2 This is an action in assumpsit brought by A. J. Lindenburg against the American Railway Express Company to recover the value of certain goods and chattels delivered to a driver of the defendant company at Indianapolis, Indiana, to be carried by the defendant to Charleston, West Virginia, charges for such transportation to be collected at the point of destination. The shipment consisted of one trunk, weighing 200 pounds, another trunk weighing 100 pounds, and a certain package weighing 10 pounds. There was issued by the defendant to the plaintiff, at the time of the delivery of the said goods and chattels, a receipt, as set forth in the record herein; that the value of said goods so delivered to the defendant was not stated by the plaintiff, nor the value demanded by the defendant; that the goods were afterwards delivered to the plaintiff at Charleston, but that one trunk weighing 200 pounds was delivered in bad order, certain of the goods being totally and others partially damaged by flooding while delayed in route, the actual damage to said goods in the trunk amounting to $916.15.

The receipt and form of receipt introduced as plaintiff's Exhibits 1 and 2 were old forms, which had been used by other companies doing business previous to the time of the delivery of the shipment in question to the plaintiff; that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant Company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission April 2, 1917, by supplemental order No. 18, as set forth in defendant's Exhibit No. 1, in the record in this case; that said tariff was in effect on the line of the defendant company between Indianapolis, Indiana, and

3 Charleston, West Virginia, at the time of the transportation of the shipment in question; that under the provisions of the Uniform Express Receipt, prescribed by the Interstate Commerce Commission under the authority of the Acts of Congress and accepted and duly filed with the Interstate Commerce Commission by the defendant as a part of its tariff and in effect at the time of the said shipment, the defendant is not liable for any greater amount than $50.00 for any shipment of 100 pounds or less, and not exceeding 50c per pound actual weight on any shipment in excess of 100 pounds, unless a greater value is stated by the shipper and paid for under the provisions of the said tariff; that the amount charged to and collected from the plaintiff on account of the transportation of all of said property was the following:

For a certain trunk weighing 200 pounds, delivered on the 24th day of August, $3.52 and 18c. war tax.

For a certain trunk weighing 100 pounds, delivered on the 22nd day of August, $1.76 and 9c. war tax.

For the package weighing 10 pounds, delivered August 6th, 42c. and 3c. war tax.

(See Record, defendant's Exhibit No. 1, for certified copy of tariff and form of receipt authorized by the Interstate Commerce Commission.)

The defendant company filed its Special Plea in writing, setting forth the provisions of the Uniform Express Receipt, prescribed by the Interstate Commerce Commission under the authority of the Acts of Congress and accepted and filed with the Interstate Commerce Commission by the defendant as a part of its tariff, which were in force and effect at the time of the said shipment, and alleging that the liability of the defendant company could not in any event exceed the sum of $110.00, which sum was tendered with said plea.

4 The matters in controversy between the plaintiff and the defendant were submitted to the Court in lieu of a jury and after the introduction of all of the evidence as shown in the bill of exceptions in this case, as also in the order of the said Circuit Court entered on the said 15th day of October, 1920, the Court held that the defendant's special plea was not good and entered an order of judgment in favor of the plaintiff and against the defendant in the sum of $916.15, with interest from said date, together with the costs, to which judgment of the Court the defendant objected and excepted.

And thereupon the defendant moved the Court to set aside its findings for the plaintiff upon the sufficiency of said special plea and its findings for the plaintiff upon the evidence in this case, and award the defendant a new trial, but the Court did refuse to set aside its findings for the plaintiff upon the sufficiency of said special plea, and did likewise refuse to set aside its findings for the plaintiff upon the evidence in this case, and award the defendant a new trial, to which action of the Court the defendant objected and excepted.

Your petitioner further represents unto your Honors that said judgment is erroneous in the following particulars, to-wit:

1. The Court erred in its judgment and finding that the defendant's special plea is not good.

2. The Court erred in entering judgment for the plaintiff and against the defendant in the sum of $916.15, with interest thereon until paid, together with the costs.

3. The Court erred in overruling the motion of the defendant to set aside its findings for the plaintiff upon the sufficiency of the defendant's special plea.

4. The Court erred in refusing to set aside its findings for the plaintiff upon the evidence in this case and refusing to award the defendant a new trial.

5 & 6 Wherefore, for the errors aforesaid, your petitioner prays that a writ of error and supersedeas may be awarded it from said judgment, and upon the hearing of this cause by this Honorable

Court said judgment may be reviewed and reversed, and such other proceedings be had as the law may direct, and your petitioner will ever pray, etc.

AMERICAN RAILWAY EXPRESS CO.,
By COUNSEL.

DAVIS & DAVIS,
Attorneys.

I, Staige Davis, an attorney practicing in the Supreme Court of Appeals of West Virginia, do certify that in my opinion there is error in the judgment above complained of, as shown in the record herewith, and that the same should be reviewed and reversed by said Supreme Court of Appeals.

Given under my hand this 12 day of November, 1920.

STAIGE DAVIS.

STATE OF WEST VIRGINIA, *To wit:*

A writ of error and supersedeas prayed for in the foregoing petition was allowed in Court at Charleston, on the 12th day of November, 1920. Bond is required in the penalty of $1,500.00, conditioned according to law.

Attest:

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

7 RECORD IN CASE.

(Pleas Before the Judge of the Circuit Court for Kanawha County, at the Court House Thereof, on the 23rd Day of October, 1920.)

No. 2649.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation.

Be it remembered, that heretofore, to-wit: On the 24th day of February, 1919, came the plaintiff by his attorney and sued out of the Clerk's Office of the Circuit Court of Kanawha County, West Virginia, a Summons in case, which Summons with the Return thereon endorsed is in the words and figures following, to-wit:

Summons in Case.

The State of West Virginia to the Sheriff of Kanawha County, Greeting:

We command you that you summon American Railway Express Company, a corporation, if it be found within your bailiwick, to

appear before the Judge of our Circuit Court for the County of Kanawha, at Rules to be held in the Clerk's office of said Court on the first Monday in March next, to answer A. J. Lindenburg, of a plea of Trespass on the Case, Damage $1,500.00, and have then there this writ.

Witness, A. P. Hudson, Clerk of our said Court, at the Court House of said County, the 24th day of February, 1919, and
8 in the 56th year of the State.

A. P. HUDSON,
Clerk.

(*Return.*)

Executed the within process on the within named The American Railway Express Company, a corporation, on the 25th day of February, 1919, by delivering an office copy thereof in the said Kanawhat County, wherein — resides, to K. P. Webb, Assistant agent, in the actual employment of said corporation; there being no president, cashier, treasurer, or other chief officer of said corporation found in said County, each and all of said officers being absent.

S. B. JARRETT,
S. K. C.,
By J. L. CARNEY,
D. S. K. C.

(And at another day, to-wit: At Rules held in the Clerk's Office of the Circuit Court for Kanawha County on the first Monday in March, 1919, came the Plaintiff by his attorneys and filed his Declaration, which Declaration is in the words and figures following, to-wit:)

STATE OF WEST VIRGINIA,
County of Kanawha, ss:

In the Circuit Court Thereof.

A. J. Lindenburg complains of the American Railway Express Company, a corporation, who have been summoned to answer the said plaintiff of a plea of trespass on the case in assumpsit. For this, to-wit, that heretofore, to-wit, on the 22nd day of July, 1918, the said defendant was a common carrier of goods and chattels for hire in and by a certain coach or train of railway cars, etc., from a certain place, to-wit, from Indianapolis, Indiana, to a certain other place, to-wit, Charleston, W. Va. And the said defendant, being such carrier as aforesaid, the said plaintiff heretofore, to-wit,
9 on the day and year first aforesaid, at the special instance and request of the defendant, caused to be delivered to the said defendant, so being such carrier as aforesaid, certain goods and chattels, to-wit:

4 linen tea towels, 1 dresser scarf, 1 bridge set, 4 pillow covers, 1 mattress cover, 3 initialed linen towels, 35 crochet linen towels,

7 plain towels, 1 embroidered bath towel, 1 crocheted bath towel, 2 plain bath towels, 3 doz. Madeira luncheon napkins (monogrammed), 1 embroidered linen double bed spread, 4 embroidered sham sheets, 11 domestic sheets, 3 percale sheets, 2 linen embroidered sheets, 6 percale embroidered sheets, 4 domestic hemstitched sheets, 1 fancy emb. linen tablecloth, 5 monogrammed linen tablecloths, 2 dozen linen napkins (monogrammed) and 9 Japanese table cloths (2), 1 lace luncheon set (24 pieces), 1 doz. thread lace doilies, 1 Marsailles spread, 1 crochet- spread, 2 embroidered linen single bed spreads, 2 embroidered crochet- linen bed spreads, 1½ doz. Japanese napkins, 2 pr. emb. linen pillow slips, 7 prs. emb. percale pillow slips, 1 maid's apron, 1 pr. plain percale pillow cases, 2 crochet- percale sheets, 2 pr. crocheted percale pillow slips, of the said plaintiff, of the value of Fifteen Hundred ($1,500.00) Dollars, to be cared for and safely carried by the said defendant, as such carrier as aforesaid, in its car, coach, etc. from Indanapolis, Indiana, to Charleston, W. Va., and at the place last mentioned, to be safely delivered by the said defendant for the said plaintiff; and in consideration thereof and of certain reward to the said defendant in that behalf, it, the said defendant, undertook as aforesaid with the said plaintiff to care for and safely carry the said goods and chattels by its car, coach, etc. from Indianapolis, Indiana to Charleston, W. Va., as aforesaid, and at the last mentioned place safely to deliver the same to A. J. Lindenburg. And although the said defendant so received and understook to carry the said goods and chattels, as aforesaid, yet not regarding its duty as such carrier, nor its promise and undertaking as aforesaid, hath not taken care of the said goods and chattels or safely carried the same from Indianapolis, Indiana, to Charleston, W. Va., nor delivered the same as it undertook to do; but on the contrary, the said defendant, being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself with respect to said goods and chattels that by its own and its servants's carelessness, negligence, and improper conduct the said goods and chattels being of the value aforesaid, afterward became and were wholly lost to the said plaintiff.

Second Count.

And for this, also, that afterward, to-wit: on the 22nd day of July, 1918, in consideration that the said plaintiff, at the special instance and request of the said defendant, had then and there caused to be delivered to the said defendant divers other goods and chattels, to-wit: goods and chattels of the like number, quantity, quality, description and value as those in the first count in this declaration mentioned, of the said plaintiff, to be cared for and safely carried by the said defendant, being such carrier as aforesaid, to Charleston, W. Va., aforesaid, and there, to-wit, at the last mentioned place, to be delivered by the said defendant for the said plaintiff, for certain reward to the said defendant in that behalf, it, the said defendant, undertook and promised the said plaintiff to take care of and safely carry the said goods and chattels to Charleston, W. Va., aforesaid,

and there to deliver the same for the said plaintiff in a reasonable time then next following. And although the said defendant received the said last mentioned goods and chattels for the purpose aforesaid, and although a reasonable time for the carriage, conveyance and delivery thereof as aforesaid, hath long since elapsed, yet the
11 said defendant, not regarding said last mentioned promise and undertaking, did not, nor would, within such reasonable time as aforesaid, or at any time afterward, although often requested so to do, safely or securely carry the said last mentioned goods and chattels to Charleston, W. Va., nor there, to-wit, at Charleston, W. Va., the place last mentioned, deliver the same for the said plaintiff, but hath hitherto wholly neglected and refused to do so, whereby the said last mentioned goods and chattels, being of the value aforesaid, have been and are wholly lost to the said plaintiff.

Third Count.

And for this, also, to-wit: that the said defendant heretofore, to-wit, on the 22nd day of July, 1918, in consideration that it, at its own special instance and request, then had the care and custody of divers other goods and chattels of the said plaintiff, of the like number, quantity, quality, description and value, as those in the first count of this declaration mentioned, it, the said defendant, undertook and then and there faithfully promised the said plaintiff to take *and* proper care thereof, whilst the said defendant so had the care and custody of the same; yet the said defendant, nor regarding its said promise and undertaking, whilst the said defendant so had the care and custody of the said goods and chattels, took so little and such bad and improper care thereof, that the same afterward, to-wit, on the day and year aforesaid, became and were greatly damaged and injured and wholly lost to the said plaintiff.

Nevertheless the said defendants, not regarding its said several promises and undertakings, hath not kept, performed or fulfilled the same, although often requested so to do, but hath broken the same as aforesaid, to the damage of the said plaintiff of Fifteen
12 Hundred ($1,500.00) Dollars. And therefore he sues.

A. J. LINDENBURG,
By COUNSEL.

MORGAN OWEN, *P. Q.*

(And at another day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 15th day of October, 1920.)

In Case No. 2649.

A. J. LINDENBURG
vs.
AMERICAN RAILWAY EXPRESS CO., a Corporation.

This day came the plaintiff, by his counsel, as also the defendant by its counsel, and it appearing to the Court that the original plea

of the general issue, as also the written special plea heretofore filed in this cause have been misplaced and cannot be found, but that true copies of said plea of the general issue as also of said special plea were shown to the Court, and it being agreed between counsel for plaintiff and the defendant that said copies of said pleas may be filed and treated in all respects as the said original pleas, it is by consent of parties ordered that said copies be filed as and in lieu of the said original plea of the general issue and said original special plea, which is accordingly done. The same is directed to appear now as for then.

(And on the same day, to-wit: At a Circuit Court for Kanawha County held at the Court House thereof on the 15th day of October, 1920.)

No. 2649.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

Trespass on the Case.

13 This day came the parties by their attorneys. The defendant tendered its Plea that it was not guilty in the manner and form as alleged in the plaintiff's declaration, and upon this put itself upon the Country, and the plaintiff did the like, and issue was thereon joined; and the defendant likewise tendered its special plea, to the filing of which the plaintiff objected, but the Court overruled the objection and ordered said plea to be filed. And thereupon the plaintiff replied generally to the same, and issue was joined thereon.

And thereupon the parties having so agreed, the matters in controversy were submitted to the Court in lieu of a Jury, and the plaintiff proved the following:

That the plaintiff on or about the 22d day of July, 1918, delivered to a driver of the defendant company at Indianapolis, Indiana, to be carried by the defendant to Charleston, West Virginia, certain goods being consigned to plaintiff, A. J. Lindenburg, c/o Hadley Company, Charleston, West Virginia, and sent charges to be collected at Charleston; that the shipment consisted of one trunk weighing 200 pounds another trunk weighing 100 pounds, and a certain package weighing 10 pounds; That there was issued by the defendant to the plaintiff at the time of such delivery a receipt introduced in evidence marked "Plaintiff's Exhibit 1;" that the form of receipt referred to in the said receipt as printed on the inside front cover of the book was likewise introduced in evidence by the plaintiff, marked "Plaintiff's Exhibit 2"; that no receipt other than that hereinbefore referred to *the* introduced in evidence was issued by the plaintiff; that the value of the said goods so delivered to the defendant was

not stated by the plaintiff, nor the value demanded by the defendant; that the goods were afterwards delivered to the plaintiff
14 at Charleston, but that one trunk, weighing 200 pounds was delivered in bad order, certain of the goods being totally and others partially destroyed by flooding, while delayed en route, the actual damage to said goods in the trunk amounting to $916.15, and thereupon the plaintiff rested.

And thereupon the defendant introduced evidence showing that the receipt and form of receipt, being Plaintiff's Exhibits 1 and 2, hereinbefore introduced, were old forms, which had been used by other Companies doing business previous to the time of the delivery of the shipment in question to the defendant; that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission, at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission, April 2, 1917, by supplemental order No. 18, and the defendant thereupon introduced in evidence a certified copy of said order, marked "Defendants Exhibit 1"; in effect on the line of the defendant company between Indianapolis, Indiana, and Charleston, West Virginia, at the time of the transportation and shipment in question; that the proper charge upon the total shipment of the defendant at the time the same moved from Indianapolis, Indiana, to Charleston, West Virginia, was $1.76 per hundred pounds and 42c. for a package of 10 pounds; that is to say for the transportation of said property at the time and between the points mentioned and at a valuation not exceeding 50c. per pound; that the amount charged to and collected from the plaintiff on account of transportation of all of said property was the following; for a certain trunk weighing 200 pounds, delivered on the 24th of August, $3.52, and 18c. war tax; for
15 a certain trunk weighing 100 pounds, delivered on the 22nd of August, $1.76 and 9c. war tax; and for the package, weighing 10 pounds, delivered August 6th, 42c. and 3c. war tax; that the charges collected on the shipment were normal express charges for transportation and no valuation charges were included therein upon any part of the shipment.

And the plaintiff and defendant having, after the introduction of evidence, rested and the Court being of opinion that the defendant's special plea is not good; it is therefore considered that the plaintiff A. J. Lindenburg, do recover against the defendant, the American Railway Express Company, the sum of $916.15, with interest from this date until paid together with the costs; to which judgment of the Court the defendant, objected and accepted, and thereupon the defendant moved the Court to set aside its findings for the plaintiff upon the sufficiency of said special plea, and its finding for the plaintiff upon the evidence in this case and award the defendant a new trial, but the Court doth refuse to set aside its finding as to the sufficiency of said special plea, and doth likewise refuse to set aside its finding for the plaintiff upon the evidence in this case and award

the defendant a new trial, to which action of the Court in refusing to set aside its finding upon said special plea and to set aside its finding for the plaintiff upon the evidence in this case and award the defendant a new trial the defendant objects and excepts.

Memo.

And the defendant is allowed thirty (30) days from the rising of this Court in which to tender its bill of exceptions to be signed and sealed by this Court.

(Plea of Defendant referred to in the foregoing order is in the words and figures following, to-wit:)

16 In the Circuit Court for the County of Kanawha, State of West Virginia.

A. J. LINDENBURG, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant.

Plea of Defendant.

Now comes the American Railway Express Company, defendant, and for the plea says, that it is not guilty in manner and form as alleged in the plaintiff's declaration, and of this it puts itself upon the Country.

(Special Plea referred to in the foregoing order is in the words and figures following, to-wit:)

In the Circuit Court for the County of Kanawha, State of West Virginia.

A. J. LINDENBURG, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS CO., Defendant.

Special Plea.

Now comes the American Railway Express Company, defendant in the above entitled action, and says, that the plaintiff ought not to have or maintain its action against the said defendant, for that the said carriage so undertaken, as alleged in the declaration, was to begin at Indianapolis, Indiana, and to terminate at Charleston, in the State of West Virginia; that under the provisions of the uniform express receipt prescribed by the Interstate Commerce Commission under the authority of the Acts of Congress and accepted and duly

filed with the Interstate Commerce Commission by the defend-
17 ant as a part of its tariffs, the defendant is not liable for any greater amount than $50.00 for any shipment of one hundred pounds or less, and not exceeding 50c. per pound actual weight on any shipment in excess of one hundred pounds, unless a greater value is stated by the shipper and paid for under the provisions of the said traiff, that no greater value than that aforesaid was at the time of the delivery of the said goods and chattels to the defendant, or any other than fixed or declared by the plaintiff, and no greater value than that aforesaid paid for by the plaintiff; and that, therefore, under the Acts of Congress, the rules and regulations of the Interstate Commerce Commission, and the provisions of said uniform receipt made and adopted in pursuance of such Acts of Congress, the defendant is not liable in any event for more than 50c. per pound, actual weight of the said goods and chattels; that the actual weight of said goods and chattels, so delivered, did not at any time exceed two hundred and ten (210) pounds; that, therefore, the liability of the defendant cannot in any event exceed the sum of $110.00, which said sum is now tendered to the plaintiff in the presence of this Honorable Court, and this the defendant is ready to verify.

AMERICAN RAILWAY EXPRESS CO.,
By Attorney- DAVIS, DAVIS & HALL,
Attorneys for Defendant.

(Plaintiff's Exhibit No. 1 referred to in the foregoing order is in the words and figures following, to-wit:)

PLAINTIFF'S EXHIBIT 1.

American Express Company.

18 Received of D. Sommers & Company the Property hereinafter described, which the Express Company undertakes to forward to the nearest point of destination reached by it, subject to the terms and conditions of the Company's regular form of receipt printed on inside front cover of this book, and which terms and conditions are agreed to by the shipper or owner in accepting this receipt. (Not Negotiable)

Date, Description, Addressed to Destination, and Contents.			
7/22-18	2 Trunks	A. J. Lindenburg	
	1 Package	c/o Hadley Co.	Sigman
		Charleston, W. Va.	

A. J. Lindenburg vs. American Ry. Express Co.

(Plaintiff's Exhibit No. 2 referred to in the foregoing order is in the words and figures following, to-wit:)

PLAINTIFF'S EXHIBIT 2.

Notice to Shipper.

National Express Company.

(Not Negotiable.)

This Company undertakes to forward to the nearest point to destination reached by it, all properties which may be — the authorized Agents of the Company, on its blank receipts No. 6053, subject to the following terms and conditions, terms and conditions are agreed to by shipper or owner in accepting this receipt:

19 1. This Company is not to be held liable for any loss or damages, except as forwarders only, nor for any loss, damage, or delay, by the dangers of navigation, by the act of God or of the enemies of the Government, by the restraints of Government, strikes, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war.

2. Nor shall this Company be liable for any default or negligence of any person, corporation or association to whom the said property shall or may be delivered by this Company, for the performance of any act or duty in respect thereto, at any place or point off the established routes or lines run by this Company, and any such person, corporation or association, is not to be regarded, deemed or taken to be the agent of this Company for any such purpose, but, on the contrary, such person, corporation or association shall be deemed and taken to be the agent of the person, corporation or association from whom this Company received the said property. It being understood that this Company relies upon the various Railroad and Steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any losses or damages caused by the detention of any train of cars or of any steamboat or other vehicle upon which said property shall be placed for transportation, nor by the neglect or refusal of any Railroad Company, Steamboat or other transportation line to receive and forward the said property. Nor shall this Company be liable for any losses or damages caused by detention of said property due to Customs Regulations.

3. It is further agreed that property covered by this receipt and passing over ocean routes in transit shall be subject to the conditions expressed in the Bills of Lading of Ocean Steamship Companies accepted for the shipment.

20 4. It is further agreed that this Company is not to be held liable or responsible for any loss of, or damage to, said property or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said Company or its servants; nor in any

event shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of Fifty Dollars upon any shipment of 100 lbs. or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs., and the liability of the Express Company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this Company's schedule of charges for excess value.

5. If the said property is offered for shipment under the special rates named in Sections "D" and "E" of the existing Official Express Classification, it is agreed that the value of the same does not exceed $10.00 per package, said rates not applying on packages of greater value.

6. This Company shall not be held liable for loss of any money, bullion, jewelry and valuable papers when enclosed with other goods and shipment as ordinary merchandise; nor shall it be held liable upon any property or thing unless properly packed and secured for transportation; nor upon any fragile fabrics, or any fabrics consisting of, or contained in, glass.

7. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the said property, and the same is not paid, or if in any case the consignee cannot be found or refuses to receive such property, or for any other reason it cannot be delivered, the shipper agrees that this Company may return said property to him subject to the conditions of this receipt, and that he will pay all charges for transportation, and
21 that the liability of this Company for such property while in its possession for the purpose of making such collection, shall be that of Warehousemen only.

8. In no event shall this Company be liable for any loss, damage or delay unless the claim therefor shall be presented to it in writing at this office within ninety days after the date of shipment in a statement to which this receipt shall be annexed.

9. It is further agreed that any carrier or party liable on account of loss or damage to any of the said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property.

10. And it is also understood that the stipulations contained herein shall extend and inure to the benefit of each and every company or person to whom, through this Company, the said property may be intrusted or delivered for transportation.

11. Deliveries at destination are only to be made within the delivery limits established at such points at the time of shipment and prepayment in such cases shall only cover places within such delivery limits.

12. Prepayment of carrying charges for shipments to Foreign Countries does not include Government or Port duties at destination.

The liability of this Company is limited to $50.00 for any shipment of 100 lbs. or less, or to 50 cents per lb. for any shipment in excess of 100 lbs. unless the just and true value is greater and is so stated in this Receipt an extra charge is paid or agreed to be paid therefor, based upon such higher value; and such liability ceases on delivery by the Company of property at nearest points to destination it can carry same. Fragile fabrics and fabrics consisting of, or contained in, glass, at owner's risk.

22 A. J. Lindenburg vs. American Railway Express Co.

DEFENDANT'S EXHIBIT No. 1.

(Defendant's Exhibit No. 1 referred to in the foregoing order is in the words and figures following, to-wit:)

No. 4198.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS CO.,

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 2nd Day of April, A. D. 1917.

Supplemental Order No. 18.

In the Matter of Express Rates, Practices, Accounts, and Revenues.

Released Rates.

The Adams Express Company, American Express Company, Canadian Express Company, The Canadian Northern Express Company, Dominion Express Company, Great Northern Express Company, National Express Company, New York & Boston Despatch Express Company, Northern Express Company, Southern Express Company, Wells Fargo & Company, and Western Express Company, Respondents.

It appearing, That on October 10, 1916, the Commission entered upon an investigation concerning the propriety of the issuances of an order authorizing the maintenance of express rates dependent upon the value declared in writing by the shipper or agreed
23 upon in writing as the released value of the property, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and its conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents be, and they are hereby, author-

ized to establish, upon not less than 10 days' notice to the Interstate Commerce Commission and the general public, by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, the following classification rules, to-wit:

Rates named in tariffs governed by this classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the property, and, except as to live stock chiefly valuable for breeding, racing, show purposes, or other special uses, other live animals named and not named herein, live birds, live pigeons, live poultry, and reptiles, are based upon property declared to be of, or released to, a value not exceeding $50.00 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds. When the declared or released value exceeds that above stated, except as to paintings, pictures, statuary, and wax figures of a declared or released value exceeding $550.00 the rates are 10 cents greater for each $100.00 or fraction thereof in excess of the value stated above.

When the declared or released value of any shipment of paintings, pictures, statuary, or wax figures exceeds $550.00 or 50 cents per pound when the weight is more than 1,100 pounds, the rates will be greater for each $100.00 or fraction thereof in excess of such value, as follows:

Between points where the first-class rate per 100 pounds:

		Cents.
	Does not exceed $1.00	25
24	Exceeds $1.00 but not $3.00	30
	Exceeds $3.00 but not $5.00	35
	Exceeds $5.00 but not $8.00	40
	Exceeds $8.00	50

Rates applicable to live stock (cattle, swine, sheep, goats, horses and mules) chiefly valuable for breeding, racing, show purposes, or other special uses, other live animals named herein, live birds, live pigeons, live poultry, reptiles, and wild animals, not named herein are based upon the following maximum values:

	Each.
Horses, jacks, jennies, mules	$200.00
Bulls	100.00
Colts, under one year, ponies	75.00
Cows, calves six months, or over, oxen, steers	75.00
Calves, under six months, deer, elk, goats, hogs, sheep	25.00
Burros, dogs, ostriches	50.00
Camels	200.00
Elephants	250.00
Wild animals not otherwise named	50.00

Birds, not otherwise name-, cats, ferrets, guinea pigs, hares, mice, monkeys, opossums, pigeons, poultry, prairie dogs, rabbits, rats, skunks, squirrels, reptiles, each $5.00; maximum value of any shipment not exceeding 100 pounds, $50.00 or when the weight exceeds 100 pounds 50 cents per pound, actual weight.

When the declared or released value exceeds the maximum value stated above the rates will be increased as follows:

Between points where the first-class rate is not over $2.00 per 100 pounds, 1 per cent of the excess value.

Between points where the first-class rate exceeds $2.00 but not $3.00 per 100 pounds, 1½ per cent of the excess value.

Between points where the first-class rate exceeds $3.00 but
25 not $5.00 per 100 pounds, 2 per cent of the excess value.

Between points where the first-class rate exceeds $5 per 100 pounds, 2½ per cent of the excess value.

It is further ordered, That the said respondents be, and they are hereby, authorized, upon like notice, to amend the form and terms and conditions of the uniform express receipt so that they will read as follows:

Uniform Express Receipt.

The company will not pay over $50 in case of loss, or 50 cents per pound actual weight, for any shipment in excess of 100 pounds unless a greater value is declared and charges for such greater value paid.

—— EXPRESS CO.

Non-negotiable Receipt.

—— —, 191–.

Received from —— —— subject to the classifications and tariffs in effect on the date hereof —— value herein declared by shipper to be — dollars.

(See footnote.)

Consigned to —— ——, at ——. Charges —.

Which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof excepts and signs this receipt.

—— ——,
For the Company.

—— ——,
Shipper.

NOTE.—The company's charges, except upon ordinary live stock, is dependent upon the value of the property as declared or
26 released by the shipper. If the shipper desires to release the value to $50.00 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50.00" or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

Terms and Conditions.

1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an *greed* valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

3. Unless caused by its own negligence or that of its agents, the company shall not be liable for.

a. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

27 *b.* The death, injury, or escape of live freight.

c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice therein.

c. Improper or insufficient packing, securing or addressing.

d. The act of God, public enemies, authority of law, quarantine, riots, strikes, *perild* of navigation, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor or consignee at stations where there is no agent of the company after such shipments have been left at such stations.

5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

6. When property is destined to a point at which no express company has an agency it should be marked with the name of the express station at which delivery will be accepted. If not so marked it will be carried to the express station nearest the destination point and arrival notice given consignee.

7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness of negligence, as conditions pre-
28 cedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

8. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service; at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

Special Additional Provisions as to Shipments Forwarded from the United States to Places in Foreign Countries.

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, lading laws, regulations and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

29 11. The company shall not be liable for any loss, damages, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs.

12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or customs duties, taxes, or charges, may be stopped in transit at foreign ports,

frontiers, or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the company, shall become a lien on the property.

It is further ordered, That express classification rules filed under authority of this order shall show in connection therewith the following notation:

Issued under authority of Interstate Commerce Commission's supplemental order No. 18 of April 2, 1917, in case No. 4198.

And it is further ordered, That a copy of this order be served upon each of the parties to this proceeding.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

DEFENDANT'S EXHIBIT No. 4.

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the schedules hereto attached, and more particularly hereinafter described, are true copies of schedules filed with the said Interstate Commerce Commission on dates specified below, to-wit:

Page 6 of Official Express Classification No. 25 F. G. Airy, Agent, I. C. C. No. A-2130, filed May 18, 1917; said page of I. C. C. No. A-2130 having been in force on July 22, 1918.

Title page and page 3 of Supplement No. 7 to said I. C. C. No. A-2130, filed June 29, 1918; said pages of Supplement No. 7 to I. C. C. No. "-2130 having been in force on July 22, 1918.

In witness whereof I have hereunto set my hand and affixed the Seal of said Commission this 28th day of May, A. D. 1919.

[SEAL.] GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

Uniform Express Receipt.

—— Express Company.

The Company will not pay over $50.00, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

Non-Negotiable Receipt.

——, —, 191 .

Received from —— —— subject to the Classifications and Tariffs in effect on the date hereof, —— value herein declared by shipper to be — dollars.

Consigned to —— ——, at ——. Charges, —.

Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.

——— ———,
For the Company.

——— ———,
Shipper.

NOTE.—The company's charge, except upon ordinary
31 live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50.00 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting "not exceeding $50.00," or "not exceeding fifty cents per pound," in which case the company's liability is limited to an amount not exceeding the value so declared or released.

Terms and Conditions.

1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.

2. In consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company, shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less, or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

3. Unless caused by its own negligence or that of its agents, the company shall not be liable for:

a. Difference in weight or quantity caused by shrinkage, leakage or evaporation.
32 *b*. The death, injury, or escape of live freight.
c. Loss of money, bullion, bonds, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

4. Unless caused in whole or in part by its own negligence, or that of its agents, the company shall not be liable for loss, damage, or delay caused by—

a. The act or default of the shipper or owner.

b. The nature of the property, or defect or inherent vice therein.

c. Improper or insufficient packing, securing, or addressing.

d. The act of God, public enemies, authority of law, quarantine, riots, strikes, perils of navigation, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

e. The examination by, or partial delivery to, the consignee of C. O. D. shipments.

f. Delivery under instructions of consignor or consignee at stations where there is no agent of the company after such shipments have been left at such stations.

5. Packages containing fragile articles or articles consisting wholly or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

6. When property is destined to a point at which no express company has an agency it should be marked with the name of the express station at which delivery will be accepted. If not so marked it will be carried to the express station nearest the destination point and arrival notice given consignee.

7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or dam-
33 aged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

8. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the Company may at its option return the property to the consignor.

9. Free delivery will not be made at points where the company maintains no delivery service; at points where delivery service is maintained free delivery will not be made at addresses beyond the established and published delivery limits.

Special Addition Provisions as to Shipments Forwarded from the United States to Places in Foreign Countries:

10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the

acts, ladings, laws, regulations, and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

11. The company shall not be liable for any loss, damage or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring
34 outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations or customs.

12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or customs, duties, taxes, or charges, may be stopped in transit at foreign ports, frontiers or depositories, and there held pending examination, assessments, and payments, and such duties and charges, when advanced by the Company, shall become a lien on the property.

(And at another day, to-wit:)

At a Circuit Court for Kanawha County Held at the Court-house Thereof on the 23rd Day of October, 1920.

No. 2649.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation,

In Assumpsit.

This day came the parties in the above styled cause by their attorneys, and the defendant, the American Railway Express Company, tendered to the said Court its bill of exceptions No. 1, embodying the defendant's special plea and the evidence introduced and the facts proven upon the trial in the above styled case, which bill of exceptions is marked with the title of this case and the words "Bill of Exceptions No. 1," and contains all of the evidence introduced and all the facts proven, and certified to be the same by the Court, and is in the words and figures following to-wit:

"Be it remembered that upon the trial of this case, the defendant tendered its special plea in writing referred to in the order entered in this cause on the 15th day of October, 1920, which said special plea is in the words and figures following, to-wit," etc.

and the plaintiff prayed the Court that the said bill of ex-
35 ceptions be signed, sealed and saved to it, which bill of exceptions, so marked "Bill of Exceptions No. 1" being examined by the Court and found to be correct, is signed and sealed accordingly and made a part of the record in this case, this the 23 day of October, 1920.

(Bill of Exceptions No. 1 referred to in the foregoing order is in the words and figures following, to wit:)

In the Circuit Court of Kanawha County, West Virginia.

A. J. LINDENBURG, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Defendant.

In Assumpsit.

Bill of Exceptions No. 1.

Be it remembered that upon the trial of this case, the defendant tendered its special plea in writing referred to in the order entered in this cause on the 15th day of October, 1920, which said special plea is in the words and figures following, to-wit:

"In the Circuit Court for the County of Kanawha, State of West Virginia.

"A. J. LINDENBURG, Plaintiff,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant."

"Special Plea."

"Now comes the American Railway Express Company, de-
36 fendant in the above entitled action, and says, that the plaintiff ought not to have or maintain its action against the said defendant, for that the said carriage so undertaken, as alleged in the declaration, was to begin at Indianapolis, Indiana, and to terminate at Charleston, in the State of West Virginia; that under the provisions of the uniform express receipt prescribed by the Interstate Commerce Commission under the authority of the Acts of Congress and accepted and duly filed with the Interstate Commerce Commission by the defendant as a part of its tariffs, the defendant is not liable for any greater amount than $50.00 for any shipment of one hundred pounds or less, and not exceeding 50c per pound actual weight on any shipment in excess of one hundred pounds, unless a greater value is stated by the shipper and paid for under the provisions of the said tariff; that no greater value than that aforesaid was at the time of the delivery of the said goods and chattels to the defendant, or any other than fixed or declared by the plaintiff, and no greater value than that aforesaid paid for by the plaintiff; and that, therefore, under the Acts of Congress, the rules and regulations of the Interstate Commerce Commission, and the provisions of said uniform receipt made and adopted in pursuance of such Acts of Congress, the defendant is not liable in any event for more than

50c per pound, actual weight of the said goods and chattels; that the actual weight of said goods and chattels, so delivered, did not at any time exceed two hundred and ten (210) pounds; that, therefore, the liability of the defendant cannot in any event exceed the sum of $100.00, which said sum is now tendered to the plaintiff in the presence of this Honorable Court, and this the defendant is ready to verify.

"AMERICAN RAILWAY EXPRESS COMPANY,
By COUNSEL.

"DAVIS, DAVIS & HALL,
Attorneys for Defendants."

37 And thereupon the plaintiff objected to the filing of said plea but the Court overruled the said objection and ordered said plea to be filed. And thereupon the plaintiff replied generally to the same and issue was joined thereon. And thereupon the parties having so agreed the matters in controversy were submitted to the Court in lieu of a Jury and the plaintiffs proved the following:

"That the plaintiff on or about the 22nd day of July, 1918, delivered to a driver of the defendant company at Indianapolis, Indiana, to be carried by the defendant to Charleston, West Virginia, certain goods being consigned to plaintiff, A. J. Lindenburg, c/o Hadley Company, Charleston, West Virginia, and sent charges to be collected at Charleston; that the shipment consisted of one trunk weighing 200 pounds, another trunk weighing 100 pounds, and a certain package weighing 10 pounds; That there was issued by the defendant to the plaintiff at the time of such delivery a receipt introduced in evidence marked "Plaintiff's Exhibit 1"; that the form of receipt referred to in the said receipt as printed on the inside front cover of the book was likewise introduced in evidence by the plaintiff, marked "Plaintiff's Exhibit 2"; that no receipt other than that hereinbefore referred to and introduced in evidence was issued by the plaintiff; that the value of the said goods so delivered to the defendant was not stated by the plaintiff, nor the value demanded by the defendant; that the goods were afterwards delivered to the plaintiff at Charleston, but that one trunk, weighing 200 pounds was delivered in bad order, certain of the goods being totally and others partially destroyed by flooding while delayed *on* route, the actual damage to said goods in the trunk amounting to $916.15, and thereupon the plaintiff rested.

"And thereupon the defendant introduced evidence show-
38 ing that the receipt and form of receipt, being Plaintiff's Exhibits 1 and 2, hereinbefore introduced, were old forms, which had been used by other Companies doing business previous to the time of the delivery of the shipment in question to the defendant; that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant company governing

transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission, at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission, April 2, 1917, by supplemental order No. 18, and the defendant thereupon introduced in evidence a certified copy of said order, marked "Defendant's Exhibit 1"; in effect on the line of the defendant company between Indianapolis, Indiana, and Charleston, West Virginia, at the time of the transportation and shipment in question; that the proper charge upon the total shipment of the defendant at the time the same moved from Indianapolis, Indiana, to Charleston, West Virginia, was $1.76 per hundred pounds and 42¢ for a package of 10 pounds, that is to say for the transportation of said property at the time and between the points mentioned and at a valuation not exceeding 50¢ per pound; that the amount charged, to and collected from the plaintiff on account of transportation of all of said property was the following; for a certain trunk weighing 200 pounds, delivered on the 24th of August, $3.52, and 18¢ war tax; for a certain trunk weighing 100 pounds, delivered on the 22nd of August, $1.76 and 9¢ war tax; and for the package, weighing 10 pounds, delivered August 6th, 42¢ and 3¢ war tax; that the charges collected on the shipment were normal express charges for transportation and on valuation charges were included therein upon any part of the shipment."

And the Court certifies that the plaintiff's Exhibits Nos.
39 1 and 2, so introduced in evidence, are in the words and figurges following, to-wit:

PLAINTIFF'S EXHIBIT 1.

"American Express Company.

"Received of D. Sommers & Co. the property hereinafter described, which the Express Company undertakes to forward to the nearest point to destination reached by it, subject to the terms and conditions of the Company's regular form of receipt printed on inside front cover of this book, and which terms and conditions are agreed to by the shipper or owner in accepting this receipt. (Not negotiable.)

"7/22/18	2 Trunk- 1 Package	A. J. Lindenburg c/o Hadley Co. Charleston, W. Va.	Sigman"

PLAINTIFF'S EXHIBIT 2.

"National Express Company.

"(Not Negotiable.)

Notice to Shippers.

"This Company undertakes to forward to the nearest point to destination reached by it, all properties which may be received by the authorized Agents of the Company, on its blank receipts No. 6053, subject to the folowing terms and conditions, and these terms and conditions are agreed to by shipper or owner in accepting this receipt:

"It is further agreed that this Company is not be held liable or responsible for any loss of, or damage to, said property or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company, or its servants; nor in any event shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of Fifty Dollars upon any shipment of 100 lbs., or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs., and the liability of the Express Company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this Company's schedule of charges for excess value.

"The liability of this Company is limited to $50 for any shipment of 100 lbs., or less, or to 50 cents per lb. for any shipment in excess of 100 lbs., unless the just and true value is greater and is so stated in this Receipt an extra charge is paid or agreed to be paid therefor, based upon such higher value; and such liability ceases on delivery by the Company of property at nearest point to destination it can carry same. Fragile fabrics and fabrics consisting of, or contained in, glass, at owner's risk."

And the Court further certifies that the defendant's Exhibit No. 1, so introduced in evidence, is in the words and figures following, to-wit:

DEFENDANT'S EXHIBIT No. 1.

"At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 2d Day of April, A. D. 1917."

"No. 4198."

"A. J. LINDENBURG

vs.

AM. RY. EXP. CO.

"Supplemental Order No. 18."

41 "In the Matter of Express Rates, Practices, Accounts, and Revenues."

"Released Rates."

"The Adams Express Company, American Express Company, Canadian Express Company, the Canadian Northern Express Company, Dominion Express Company, Great Northern Express Company, National Express Company, New York & Boston Despatch Express Company, Northern Express Company, Southern Express Company, Wells Fargo & Company, and Western Express Company, Respondents."

"It appearing, that on October 10, 1916, the Commission entered upon an investigation concerning the propriety of the issuance of an order authorizing the maintenance of express rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and its conclusions thereon, which report is hereby referred to and made a part hereof:

"It is ordered, that the respondents be, and they are hereby authorized to establish, upon not less than 10 days' notice to the Interstate Commerce Commission and the general public, by filing and posting in the manner prescribed in section 6 of the act to regulate commerce, the following classification rules, to-wit:

"Rates named in tariffs governed by this classification, except as to ordinary live stock, are dependent upon and vary with the declared or released value of the property, and, except as to live stock chiefly valuable for breeding, racing, show purposes, or other
42 special uses, other live animals named and not named herein, live birds, live pigeons, live poultry, and reptiles, are based upon property declared to be of, or released to, a value not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds. When the declared or released value exceeds that above

stated, except as to paintings, pictures, statuary, and wax figures of a declared or released value exceeding $550 the rates are 10 cents greater for each $100 or fraction thereof in excess of the value stated above.

"When the declared or released value of any shipment or paintings, pictures, statuary, or wax figures exceeds $550 or 50 cents per pound when the weight is more than 1,100 pounds, the rates will be greater for each $100 or fraction thereof in excess of such value, as follows:

"Between points where the first-class rate per 100 pounds:

	Cents.
"Does not exceed $1.00	25
Exceeds $1.00 but not $3.00	30
Exceeds $3.00 but not $5.00	35
Exceeds $5.00 but not $8.00	40
Exceeds $8.00	50

"Rates applicable to live stock (cattle, swine, sheep, goats, horses and mules) chiefly valuable for breeding, racing, show purposes, or other special uses, other live animals named herein, live birds, live pigeons, live poultry, reptiles, and wild animals, not named herein are based upon the following maximum values.

	Each.
"Horses, jack, jennies, mules	$200.00
Bulls	100.00
Colts, under one year, ponies	75.00
Cows, calves six months or over, oxen steers	75.00

43

Calves, under six months, deer, elk, goats, hogs, sheep	25.00
Burros, dogs, ostriches	50.00
Camels	200.00
Elephants	250.00
Wild animals not otherwise named	50.00

"Birds, not otherwise named, cats, ferrets, guinea pigs, hares, mice, monkeys, opossums, pigeons, poultry, prairie dogs, rabbits, rats, skunks, squirrels, reptiles, each $5.; maximum value of any shipment not exceeding 100 pounds, $50, or, when the weight exceeds 100 pounds 50 cents per pound, actual weight.

"When the declared or released value exceeds the maximum value stated above the rates will be increased as follows:

"Between points where the first-class rate is not over $2 per 100 pounds, 1 per cent of the excess value.

"Between points where the first-class rate exceeds $2 but not $3 per 100 pounds, 1½ per cent of the excess value.

"Between points where the first-class rate exceeds $3, but not $5 per 100 pounds, 2 per cent of the excess value.

"Between points where the first-class rate exceeds $5 per 100 pounds, 2½ per cent of the excess value."

"It is further ordered, That the said respondents be, and they are hereby, authorized, upon like notes, to amend the form and terms and conditions of the uniform express receipt so that they will read as follows:

"Uniform Express Receipt."

"The company will not pay over $50, in case of loss, or 50 cents per pound actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

44 "Non-negotiable Receipt.

—— Express Company.

—— —, 19—.

"Received from —— ——, subject to the classifications and tariffs in effect on the date hereof, —— value herein declared by shipper to be — dollars.

(See footnote.)

"Consigned to —— —— at ——. Charges —.

"Which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.

—— ——,
For the Company.

—— ——,
Shipper.

"NOTE.—The company's charges, except upon ordinary live stock, is dependent upon the value of the property, as declared or released by the shipper. If the shipper desires to release the value to $50 for any shipment of 100 pounds or less, or not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds, the value may be released by inserting 'not exceeding $50.' or 'not exceeding fifty cents per pound,' in which case the company's liability is limited to an amount not exceeding the value so declared or released."

"Terms and Conditions."

"1. The provisions of this receipt shall inure to the benefit of and be binding upon the consignor, the consignee, and all carriers handling this shipment, and shall apply to any reconsignment, or return thereof.

"2. In consideration of the rate charged for carrying said
45 property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty

cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared at the time of shipment, the shipper agrees that the company shall not be liable in any event for more than fifty dollars for any shipment of 100 pounds or less or for more than fifty cents per pound, actual weight, for any shipment weighing more than 100 pounds, unless a greater value is stated herein. Unless a greater value is declared and stated herein the shipper agrees that the value of the shipment is as last above set out and that the liability of the company shall in no event exceed such value.

"3. Unless caused by its own negligence or that of its agents, the company shall not be liable for—

"*a*. Difference in weight or quantity caused by shrinkage, leakage, or evaporation.

"*b*. The death, injury, or escape of live freight.

"*c*. Loss of money, bullion, bond, coupons, jewelry, precious stones, valuable papers, or other matter of extraordinary value, unless such articles are enumerated in the receipt.

"4. Unless caused in whole or in part by its own negligence or that of its agents, the company shall not be liable for loss, damage or delay caused by—

"*a*. The act or default of the shipper or owner.

"*b*. The nature of the property, or defect or inherent vice therein.

"*c*. Improper or insufficient packing, securing or addressing.

"*d*. The act of God, public enemies, authority of law, quarantine, riots, strikes, perils of navigation, the hazards or dangers incident to a state of war, or occurrence in customs warehouse.

46 "*e*. The examination by, or partial delivery to, the consignee of C. O . D. shipments.

"*f*. Delivery under instructions of consignor or consignee at stations where there is no agent of the company after such shipments have been left at such stations.

"5. Packages containing fragile articles or articles consisting wholly of or in part of glass must be so marked and be packed so as to insure safe transportation by express with ordinary care.

"6. When property is destined to a point at which no express company has an agency it should be marked with the name of the express station at which delivery will be accepted. If not so marked it will be carried to the express station nearest the destination point and arrival notice given consignee.

"7. Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to

recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; and suits for loss, damage, or delay shall be instituted only within two years and one day after delivery of the property or, in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed.

"8. If any C. O. D. is not paid within thirty days after notice of non-delivery has been mailed to the shipper the company may at its option return the property to the consignor.

"9. Free delivery will not be made at points where the company maintains no delivery service; at points where delivery service is maintained free delivery will not be made at addresses be-
47 yond the established and published delivery limits.

"Special Additional Provisions as to Shipments Forwarded from the United States to Places in Foreign Countries."

"10. If the destination specified in this receipt is in a foreign country, the property covered hereby shall, as to transit over ocean routes and by their foreign connections to such destination, be subject to all the terms and conditions of the receipts or bills of lading of ocean carriers as accepted by the company for the shipment, and of foreign carriers participating in the transportation, and as to such transit is accepted for transportation and delivery subject to the acts, ladings, laws, regulations, and customs of oversea and foreign carriers, custodians, and governments, their employees and agents.

"11. The company shall not be liable for any loss, damage, or delay to said shipments over ocean routes and their foreign connections, the destination of which is in a foreign country, occurring outside the boundaries of the United States, which may be occasioned by any such acts, ladings, laws, regulations, or customs.

"12. It is hereby agreed that the property destined to such foreign countries, and assessable with foreign governmental or custom duties, taxes, or charges, may be stopped in transit at foreign ports frontiers, or depositories, and there held pending examination assessments, and payments, and such duties and charges, when advanced by the company, shall become a lien on the property."

"It is further ordered, That express classification rules filed under authority of this order shall show in connection therewith the following notation:
48 "Issued under authority of Interstate Commerce Commission's supplemental order No. 18 of April 2, 1917, in case No. 4198."

"And it is further ordered, That a copy of this order be served upon each of the parties to this proceeding.

"By the Commission.

"GEORGE B. McGINTY,
Secretary."

"[SEAL.]

And the Court hereby certifies that the foregoing contains all of the evidence introduced and facts proven by both the plaintiff and the defendant upon the trial of this case.

And the Court further certifies that upon the evidence so introduced and the facts so proven, the finding of the Court was that the defendant's special plea is not good, and that the plaintiff, A. J. Lindenburg, do recover against the defendant, the American Railway Express Company, the sum of $916.15, with interest from the 15th day of October, 1920, until paid, together with the costs, which findings and order of judgment the defendant, American Railway Express Company, objected and excepted to, and moved the Court to set aside its finding upon the sufficiency of said special plea and its finding in favor of the plaintiff upon the evidence introduced and facts proven, which motions, and each of them, the Court overruled, and to this action of the Court in overruling said motions, and each of them, the plaintiff excepted and tendered this its bill of exceptions, marked for identification "Bill of Exceptions No. 1", and prays that the same may be signed and sealed by the Court and made part of the record in this case, which is accordingly done, this 23 day of October, 1920.

H. D. RUMMEL, [SEAL.]
Judge of the Circuit Court of Kanawha County.

49 STATE OF WEST VIRGINIA,
Kanawha County, ss:

I, A. P. Hudson, Clerk of the Circuit Court for said County and in said State do hereby certify that the foregoing is a true, full and complete transcript in the case of A. J. Lindenburg vs. American Railway Express Company.

Given under my hand and the seal of said Court this 11th day of October, 1920.

[SEAL.]

A. P. HUDSON,
Clerk Kanawha Circuit Court.

(Printed January 21, 1921.)
(Printer's fee for petition, record, index and cover, $38.25.)

Compared Mar. 1, 1921.
WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

50 At another day, to-wit, on the 13th day of April, 1921, the following order was made and entered:

4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Kanawha County Rendered on the 15th Day of October, 1920.

This day came the plaintiff in error, by A. M. Hartung and Davis & Davis, its attorneys, and the defendant in error, by Morgan Owen, his attorney, and this case was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, and is submitted for decision.

At another day, to-wit, on the 19th day of April, 1921, the following order was made and entered:

4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Kanawha County Rendered on the 15th Day of October, 1920.

The Court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment. It is therefore considered by the Court that the judgment of the Circuit Court of Kanawha County, rendered in this case on the 15th day of October, 1920, be and the same hereby is affirmed, and that the defendant in error do recover from the plaintiff in error his costs about his defense in this Court in this behalf expended, and damages according to law: all of which is ordered to be certified to the Circuit Court of Kanawha County.

The decision of points in the foregoing case, as the same appears from the syllabus and written opinion prepared by Judge Poffenbarger, was concurred in by Judges Ritz, Miller, Lynch and Lively.

51 The syllabus and written opinion filed in the foregoing case and made part of the foregoing order are in the words and figures following:

52

No. 4221.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

Kanawha County.

Affirmed.

Poffenbarger, Judge.

1. Under the Act of Congress, passed Aug. 9, 1916, sec. 7976, Barnes' Federal Code, known as the "Second Cummins Amendment" to the Interstate Commerce Act, a common carrier is liable for the full actual loss, damage or injury to ordinary live stock received by it for shipment in interstate commerce, caused by it or any connecting carrier to which it is delivered, and for such loss, damage or injury to any other property so received, except baggage, unless, by the action of the Interstate Commerce Commission and itself, exoneration from such liability and adoption of a limited one based upon a declared or agreed value, are effected.

2. Even though the Interstate Commerce Commission, under the authority conferred upon it by said statute, has adopted and promulgated regulations by which such limitation of liability may be effected as to all property in interstate shipment, except ordinary live stock, and in compliance with such regulations, a carrier has filed and published, and put into effect, its tariffs and rules for maintenance of rates dependent upon value declared in writing by the shipper or agreed upon in writing as the released value of the property, approved by said commission, it remains liable for such full actual loss, damage or injury, in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him upon the released value thereof, signed by him.

53

3. In such case the delivery to the shipper, of a receipt executed by the carrier, in which there is no statement of value signed by the shipper, does not relieve the latter from liability based upon full actual value, even though the rate charged for carriage of the property is the same as would have been legally charged upon the minimum value of the property, under the regulations and tariffs validly promulgated, posted and maintained.

4. So interpreted, said statute does not conflict with the provisions of the Interstate Commerce Act, inhibiting preferences and unjust discrimination, nor is it inconsistent with them or either of them.

54 POFFENBARGER, *Judge:*

The judgment here involved stands upon the theory of liability of the plaintiff in error, for full value of property entrusted to it for transportation from Indianapolis, Ind. to Charleston, W. Va., and lost in shipment, by reason of failure on its part to comply with provisions of the federal statute, authorizing express companies to limit their liability, on the basis of declared or agreed value, and known as the "Second Cummins Amendment." Barnes' Fed. Code, sec. 7976. The issues of fact were tried by the court in lieu of a jury and the substance of the evidence was made a part of the record.

The shipment consisted of two trunks weighing, respectively, 200 pounds and 100 pounds and a 10 pound package. On delivery at Charleston, the 200 pound trunk was in bad condition, some of the goods in it having been totally destroyed and others badly damaged by water, in some way. As proved and found by the court, the damages amounted to $916.15. On the theory of compliance with the law and validity of the tariff regulations and receipt given, the defendant admitted liability in the sum of $110.00, tendered that amount and denied liability for anything more.

The charges paid were such in amount as would have corresponded with a declared or released value of 50 cents per 100 pounds, the ordinary or basic value of property, with some exceptions, as fixed for purposes of transportation by the Interstate Commerce Commission regulations; and the uniform receipt prescribed by that commission, in the absence of a specification of a higher value. The receipt given the shipper, however, was not in the form of the uniform receipt so prescribed and in use, at the time of the shipment. It was an old form in use under former law, known as the "First Cummins Amendment" or the "Carmack Amendment." It absolved the company from loss or damage by default or negligence occurring beyond its own lines and contained no declaration
55 or release of value in writing, signed by the shipper, which the law in force at the date of the shipment required.

It is unnecessary to inquire and determine whether the plaintiff in error has been specifically or expressly authorized by the Interstate Commerce Commission, to avail itself of the law authorizing limitation of its liability; since we are clearly of the opinion that, if authorized so to do, it omitted to avail itself of the right of limitation, in respect of the shipment in question, by its failure to comply with the regulation provided for effectuation thereof.

Having declared that all common carriers engaged in interstate commerce should be liable for the full actual loss, damage or injury to property received by them for transportation in such commerce, occurring on their own lines or those of connecting carriers, the statute provides for partial limitation of such liability, as to some

kinds of property, under certain circumstances. In the case of ordinary live stock, there can be no limitation. Liability for such full value does not apply to baggage. Nor does it apply to any other property, save ordinary live stock, that the Interstate Commerce Commission may see fit, in the exercise of its discretion and powers, to require or authorize to be carried upon rates dependent upon "the value declared in writing by the shipper or agreed upon in writing as the released value" thereof. In other words, no property can be carried upon such rates and under such a limitation, except baggage and such other property as the Commission requires or authorizes to be so carried. When there is an acceptance of property that has been required or authorized to be so carried and the value thereof has been so declared or agreed upon, the liability of the carrier is limited to such value.

Under the authority thus conferred upon it, the Interstate Commerce Commission has authorized all property other than ordinary live stock, to be carried at rates dependent upon such de-
56 clared or agreed values and limited liability. That the property involved here could have been so carried is beyond doubt, and it also falls within the class authorized to be carried on a value not exceeding $50.00 for a shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for a shipment in excess of 100 pounds, unless a greater value is declared or agreed upon in writing.

For some reason presumptively found in necessity or expediency, the statute requires the declaration or agreement as to value to be made in writing, or rather does not authorize carriage under limited liability, nor the Commission to provide for it, except upon a written declaration or agreement as to value. In its prescription of the uniform receipt, the Commission has observed this requirement, by providing spaces for the value and the signature of the shipper. It has also interpreted the statute as requiring the carrier to give the shipper an opportunity to elect what value he shall declare, whether that specified in the classification for use in the absence of a declaration of any other, or some higher valuation imposing upon him a higher rate for transportation. In other words, the receipt contemplates a declaration of value by the shipper or an agreement with him upon the value in every instance. This seems to be the only interpretation of which the statute is fairly susceptible. It does not authorize either the Commission of the carrier to fix values. It says property may be authorized to be carried upon "rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property."

As, in this instance, the carrier did not take from the shipper a written declaration of value nor a written agreement as to value signed by him, it failed to place itself within the require-
57 ments of the statute and the regulations of the Interstate Commerce Commission prescribed thereunder. In other words, it did not comply with the conditions precedent to its right to carry the property under a limitation of liability. It should have given him a receipt specifying a value fixed by himself, and evi-

denced by his signature. In doing so, it would have given him the option as to value contemplated by the law. In failing to do so, it denied him that option. Besides, it neglected to avail itself of the right conditionally conferred upon it by the statute and the regulations, by its failure to take his written declaration or agreement as to value. A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him.

Preparation and promulgation of regulations by the Interstate Commerce Commission and the posting of tariffs by the carrier, conforming to such regulations, do not alone limit the liability in any particular case. Although they may be constructive notice to the shipper, the carrier's liability stands on the basis of full actual value, unless limited in the manner prescribed. Such limitation cannot be effected in any other way. McCormick v. Southern Express Co., 81 W. Va., 87. As the provision now under consideration was not in the "Carmack Amendment" nor the "First Cummins Amendment," the decisions interpreting and applying them, relied upon in the argument submitted for the plaintiff in error, are not applicable. In American Express Co. v. U. S. Horse Shoe Co., 244 U. S., 58, decided under the present law, the shipper signed the written valuation. In Boston and Maine R. Co. v. Piper, 246 U. S. 439, the bill of lading contained an illegal limitation upon which the carrier relied in its defense.

This interpretation does not permit discrimination and preferences forbidden by secs. 7885 and 7886, Barnes' Federal Code, secs. 2 and 3 ch. 104, Act. Feby. 4, 1887. All of these provisions
58 must be read together. What is authorized by one of them is not forbidden by any other. They are not irreconcilably repugnant. The terms of the section inhibiting preferences are very general. They do not enumerate or define preferences. What another statute legalizes cannot be deemed to be an undue or unreasonable preference. The Cummins Amendment contemplates and expressly imposes liability on the basis of full actual value, unless the carrier limits it to a different basis, by compliance with certain conditions. If, in a practical sense, this statute works discrimination, it is not an illegal discrimination. Unjust discrimination is different treatment of persons of the same class, under like or similar conditions. For the difference in treatment of shippers so effected, there is ample basis in the difference in circumstances. A shipper who has been denied a right which the law requires the carrier to extend to him, respecting the rate he shall pay and the extent of its liability to him, occupies a substantially different position from that of one to whom such right has been accorded. That difference constitutes firm ground for classification in legistion. The purpose of the statute is to give the shipper right in every case to hold the carrier to liability on the basis of actual value, if he desires to do so; but, to avail himself of such right, he must state such value in money in his declaration or agreement and pay charges based thereon. To effectuate this purpose and adequately guarantee such right to him, it has been deemed necessary to require the carrier, in every instance, to allow him an opportunity to elect what value he will

place upon his property, by taking his statement as to it, writing it in the receipt and requiring him to sign it. Imposition of this duty upon both parties prevents the carrier from fixing the value itself in the great majority of cases, as it did under the "First Cummins Amendment." Hence, the provision is a vital one and stands upon considerations of very great importance.

Upon these principles and conclusions the judgment complained of will be affirmed.

59 At another day, to-wit, on the 10th day of May, 1921, the following order was made and entered:

4221.

A. L. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

A petition for re-argument and rehearing having been filed in the foregoing case, said petition is ordered docketed and the final judgment entered in said case on a former day of the present term of this Court hereby is suspended until the further order of this Court.

The petition for re-argument and rehearing filed in this case is in the words and figures following:

60 Filed May 10, 1921. Wm. B. Mathews, Clerk of the Supreme Court of Appeals.

In the Supreme Court of Appeals of West Virginia, Charleston.

No. 4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

From the Circuit Court of Kanawha County, West Virginia.

Petition of Plaintiff in Error for Rehearing and Memorandum of Argument.

A. M. Hartung,
Davis & Davis,
Attorneys for Petitioner.

61 In the Supreme Court of Appeals of West Virginia, Charleston.

No. 4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

From the Circuit Court of Kanawha County, West Virginia.

Petition of Plaintiff in Error for Rehearing and Memorandum of Argument.

To the Honorable Judges of the Supreme Court of Appeals of West Virginia:

Your petitioner, The American Railway Express Company,
62 would respectfully ask that the opinion of this Court in this cause rendered on the 19th day of April, 1921, be reconsidered. A further consideration of the opinion is desired, not so much because of the monetary amount involved in this case, but because the precendent established by the Court's opinion, and its far reaching effect, which opinion is, we believe, contrary to the language and spirit of the "Second Cummins Amendment" and in conflict with the generally accepted construction thereof, by Federal and State decisions.

Your petitioner does set forth in a memorandum hereto annexed argument and authority in support hereof.

This petitioner avers that the said decision and opinion of this Court rendered in this cause on the said 19th day of April, 1921, draws in question the validity of the said Statute of the United States of America, known as the "Second Cummins Amendment" to the Interstate Commerce Act, as set forth in an Act of Congress of the United States, passed August 9th, 1916, and found in 8 U. S. Compiled Statutes (1916) Section 8604*a*, and the said decision is against the validity of said Statute.

Your petitioner further avers that the said opinion and decision rendered in this cause, as aforesaid, on the 19th day of April, 1921, denies this petitioner, and is against the right, privilege and immunity, especially set up and claimed by this petitioner under the Statute of the United States of America, known as the "Second Cummins Amendment" to the Interstate Commerce Act, as set forth in the Act of Congress of United States, passed August 9th, 1916, as aforesaid.

63 Your petitioner, therefore, prays that this Honorable Court may grant a rehearing in this case, and that upon such rehearing the judgment of the Circuit Court of Kanawha County be reversed, and that the opinion of this Court may not require

written declaration to be signed by the shipper, as pre-requisite, to relieve the common carrier from liability for full and actual value of shipment, when the common carrier has promulgated, posted and maintained regulations and tariffs conformable to the rules of the Interstate Commerce Commission, as required by Act of Congress of the United States of America, passed August 9th, 1916, Section 7976, Barnes' Federal Code (8 U. S. Compiled Statutes, Section 8604*a*), known as the "Second Cummins Amendment" to the Interstate Commerce Act.

Respectfully submitted this 10th day of May, 1921.

STAIGE DAVIS,
C. N. DAVIS,
Of Counsel for the Petitioner American Railway Express Company.

A. M. HARTUNG,
DAVIS & DAVIS,
Attorneys for Plaintiff in Error.

64 In the Supreme Court of Appeals of West Virginia, Charleston.

No. 4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

From the Circuit Court of Kanawha County, West Virginia.

Memorandum of Argument of Counsel for Petitioner upon Petition for a Rehearing in the Above Styled Cause.

To the Honorable Judges of the Supreme Court of Appeals of West Virginia:

65 The opinion of the Court, handed down in this cause on the 19th day of April, 1921, affirms the judgment of the Circuit Court of Kanawha County, West Virginia, in this cause pronounced on the 15th day of October, 1920.

In support of the petition for rehearing of this cause, we respectfully ask consideration of the points and authorities hereinafter set forth.

The decision of this Court construes the Act of Congress of August 9, 1916 ("Second Cummins Amendment" to the Interstate Commerce Act) as follows:

"1. Under the Act of Congress, passed Aug. 9, 1916, Sec. 7976, Barnes' Federal Code, known as the 'Second Cummins Amendment'

to the Interstate Commerce Act, a common carrier is liable for the full actual loss, damage or injury to ordinary live stock received by it for shipment in interstate commerce, caused by it or any connecting carrier to which it is delivered, and for such loss, damage or injury to any other property so received, except baggage, unless by the action of the Interstate Commerce Commission and itself, exoneration from such liability and adoption of a limited one based upon a declared or agreed value, are effected.

"2. Even though the Interstate Commerce Commission, under the authority conferred upon it by said statute, has adopted and promulgated regulations by which such limitation of liability may be effected as to all property in interstate shipment, except ordinary live stock, and in compliance with such regulations, a carrier has filed and published, and put into effect, its tariffs and rules for
66 maintenance of rates dependent upon value declared in writing by the shipper or agreed upon in writing as the released value of the property, approved by said commission, it remains liable for such full actual loss, damage or injury, in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him upon the released value thereof, signed by him.

"3. In such case the delivery to the shipper, of a receipt executed by the carrier, in which there is no statement of value signed by the shipper, does not relieve the latter from liability based upon full actual value, even though the rate charged for carriage of the property is the same as would have been legally charged upon the minimum value of the property, under the regulations and tariffs validly promulgated, posted and maintained.

"4. So interpreted, said Statute does not conflict with the provisions of the Interstate Commerce Act, inhibiting preferences and unjust discrimination, nor is it inconsistent with them or either of them."

We earnestly and respectfully submit that the construction in said opinion of the "Second Cummins Amendment" is not warranted by the language of the Act itself and not in accord with Federal decisions construing the Act, which in part is as follows:

"shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation Company to which such property may be delivered, or over whose line or lines such property may pass within
67 the United States * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed, and any such common carrier * * * so receiving property for transportation * * * shall be liable to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon, whether such receipt or bill of lading has been is-

sued or not, for the actual loss, damage or injury to such property, caused by it or by any such common carrier, railroad or transportation Company, to which such property may be delivered * * * notwithstanding any limitation of liability or limitations of the amount of recovery or representation or agreement as to value in any such receipt or bill or lading, or in any contract, rule, regulation or in any tariff, filed with the Interstate Commerce Commission; Provided, however, That the provisions hereof, respecting liability for full actual loss, damage or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation, concerning which the carrier shall have been, or shall hereafter be, expressly authorized or required by order of the Interstate Commece Commission to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property, in which case such declaration
68 or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not as far as relates to values, be held to be a violation of Section 10, of this Act, to regulate commerce, as amended, and any tariff schedule which may be filed with the Commission, pursuant to such order, shall contain specific reference thereof and may establish rates, varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation."

This Court predicates its decision upon the failure of the American Railway Express Company to take

"from the shipper a written declaration of the value of the property, or a written agreement with him, upon the released value thereof, signed by him."

which opinion states:

"the law in force at the date of the shipment required."

The language of the Act is

"dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property."

We insist, for reasons hereafter set forth, that
69 the plaintiff did agree in writing as to the released value of the property in question.

Acceptance of the receipt by plaintiff, signed by the defendand company, through its agent Sigman, is sufficient to make its provisions binding upon plaintiff.

The written receipt and contract issued in this case and introduced by plaintiff as establishing his right to recovery ("Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2", Record pp. 17 to 21 inclusive), signed by the American Railway Express Company, through its agent, Sigman, and delivered to and accepted by the plaintiff, contains a provisions limiting the carriers' liability to $50.00 upon any shipment of 100 pounds or less and not exceeding 50 cents per pound upon any shipment weighing more than 100 pounds, unless the just and true value is declared at the time of shipment, and the declared value in excess of the value specified is paid for, or agreed to be paid for, under the Company's schedule for charges for excess value. (Record, page 20).

The plaintiff introduced said contract of carriage in evidence as measuring the rights and liabilities of the parties, relative to such shipment, and must be bound by all of its terms and conditions. Kelly v. Dutch Church, 2 Hill (N. Y.) 105, 111; Fitch v. Mayor, 88 N. Y. 500, 502; Brandt v. Public Bank, 139 App. Div. 173; also Bates v. Wier, 105 N. Y. Supp. 785, where goods worth $6,000.00 consigned to the plaintiff, the owner, with no value declared,
70 and the court held that the plaintiff could not recover, to exceed $50.00 That if he is to be considered as suing on the contract of carriage, he ratifies the act of his bailee, (the shipper), in entering into the contract, and is bound by all its terms; but if he repudiates the contract, he cannot claim that the common carrier ever became as to him, other than a gratuitous bailee, and can recover only upon showing damage from gross negligence or from willful act.

The second Cummins Amendment, as the Court says several times in its opinion, requires the declaration of agreement as to value to be made in writing, but it does not provide for signature by the shipper, and it would seem that this Court infers that duty from the fact that the form embodied in the order of the Interstate Commerce Commission in the matter of Express Rates, Practices, Accounts, and Revenues, Released Rates, of April 2, 1917, provides spaces for the value and signature of the shipper. The Court did not have before it, and apparently overlooked the opinion of the Interstate Commerce Commission in accordance with which the order just referred to was made, in which it appears that the Uniform Express Receipt adopted by the Commission was the one presented by the Express Companies to the Commission for its approval and authority, and that nothing is said in that opinion of the Commission, or in the order, with respect to a requirement of signature by the shipper, to the agreement or declaration of value, 43 I. C. C. p. 510.

It is clearly established by the Record that the defendant had in pursuance of the provisions of the second Cummins Amend-
71 ment secured the authority of the Interstate Commerce Commission to establish and maintain rates dependent upon and varying with the declared or released value of the property, and that it had prepared and filed with the Interstate Commerce Commission its Official Classification, tariffs, and Uniform Express

Receipt in accordance therewith, and the presumption is that such tariffs and Uniform Express Receipt were filed at Indianapolis, Indiana, at which point the plaintiff made the shipment in question, in this case. Cincinnati & Tex. Pac. Ry. v. Rankin, 241 U. S. 319, p. 327, where it is stated:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.' Bank of the United States v. Dandridge, 12 Wheat., 64, 69-70; Knox County v. Ninth National Bank, 147 U. S. 91, 97, Maricopa & Phœnix RR. v. Moore, 183 U. S. 642,649."

The printed form of Express Receipt is an agreement in
72 writing, Matter of Benson, 34 Fed. 649; Benson v. McMahon, 127 U. S. 457, 468, 469; Commonwealth v. Ray, 69 Mass. p. 441, 447; Frasier v. State, 159, Ala. 1, 47 South. Rep. 245; Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803, 807; Johnson v. State, 69 Ala. 593, 596; Horner v. Missouri Pac. Ry. Co. 70 Mo. App. 285, 291; American Mutoscope & Biograph Co. v. Edison Mfg. Co. 137 Fed. 262, 265.

Abbott's Law Dictionary, p. 659, defines "write"—

"To express thought by visible words; to impress or mark letters communicating ideas, with coloring matter, upon paper or parchment, by means of pen, pencil or types * * * In the vernacular, 'to write' and 'writing' are in contrast with 'to print' and 'printing', but in law the latter are included in the former."

In Richmond & Alleghany R. R. Co. v. Patterson Tobacco Co. 169 U. S. 311, there was involved a statute of Virginia which provided that a common carrier accepting property for delivery beyond its own line, could limit its liability to its own line only by an agreement in writing, signed by the shipper or his agent. The only point decided in the case was that such a statute was not repugnant to the Commerce Clause of the Federal Constitution. However, in a later case, M. K. & T. Ry. Co. v. McCann, 147 U. S. p. 580, the same court referring to the Patterson case, at p. 590, said:

"Such was the exact condition in the Patterson case, supra, for it cannot be doubted that if in that case there had been no statute
requiring the signature of the shipper to a contract limiting
73 liability, a contract not signed by the shipper containing an exemption would have been efficacious."

In Michigan Central R. R. Co. v. Chicago Electric Vehicle Co. 124 Ill. App. 158, 160, it was held that a shipping order signed by the shipper and accepted by the Railroad Company became "a contract in writing" between the parties as fully and completely as if the carrier had signified its acceptance in writing, the court citing three earlier cases in the Supreme Court of Illinois, to the effect that a contract signed by one party, if accepted by the other, is binding on both; that the signature of both parties is not always a necessary requisite to a written contract is established; see among other cases, National Cash Register Co. v. Lesko, 77 Con. 276, 58 Atl. 967, 968, Schnurr v. Quinn, 82 N. Y. Supp. p. 468; Sellers v. Greer, 50 N. E. 246; Harts v. Emery, 56 N. E. 866.

In McDermott v. Mahoney, 139 Iowa, 292, 298, 115 N. W. 32, 35, the court said:

"A written instrument purporting to set forth the mutual obligations of a contract, which though unilateral in form and signed by one party only, is by him delivered to the other and accepted as the contract between the parties, is a written contract. Where a written agreement signed by one party is accepted and adopted by the other, and acted upon, it becomes their contract in the same sense as though both parties had signed it."

These decisions clearly establish that assuming there is a requirement that the written declaration or agreement of value in writing be signed by the shipper, that requirement is fully met when
74 the receipt for the shipment is signed by the Company and delivered and accepted by the shipper, as was the case here.

If the defendant has been in any respect lacking in the performance of the full duty imposed upon it by law, to limit its liability here, it is in the use of a form of receipt differing in language from the one duly in effect at the time of the movement of the plaintiff's shipment. But insofar as the amount of its liability to this plaintiff is concerned, that variation of language is immaterial for neither the shipper nor the carrier could make any agreement either oral or in writing which in any way deviated from the filed tariffs, as has been repeatedly held by the United States Supreme Court, among other cases, in Atchison, Topeka & Santa Fe Ry. Co. v. Robinson, 233 U. S. 173, p. 181. Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155; Kansas City Southern Ry. Co. v. Carl, 227 U. S. 639, 653; Illinois Central R. R. Co. v. Henderson Elevator Co. 226 U. S. 441; Louisville & Nashville R. R. Co. v. Maxwell, 237 U. S. 94; and P. C. C. & St. L. Ry. Co. v. Fink, 250 U. S. p. 577, in which it is said at P. 581:

"However, this may be, in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce. The purpose of the Act to Regulate Commerce, frequently declared in the decision of this court, was to provide one rate for all shipments of like character, and

to make the only legal charge for the transportation of goods
75 in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the Act to secure."

To permit the plaintiff in this case, who accepted a receipt showing a valuation on his shipment of not exceeding $50.00 or 50 cents per pound, and paid charges on that basis, with specific notice that if the true value of the shipment were declared a charge would be made for the excess value, is to afford to this shipper an undue preference in violation of the Act to Regulate Commerce, and to unjustly discriminate against all other shippers of property by express whose recovery is limited to $50.00 on shipments weighing 100 pounds or less, and not exceeding 50 cents per pound of the actual weight of the shipment on shipments weighing in excess of 100 pounds, unless a charge is made for the value of the property in excess of that amount; and permits the shipper to repudiate the conditions on which he obtained the lower rate, and to recover more than the value which he placed upon his property.

We invite the Court's attention to a careful consideration of the opinion in the case of Tribble vs. Southern Express Company (Supreme Court of South Carolina, September 4th, 1918) 96 S. E. 712. The Court had under consideration the construction of the "Second Cummins Amendment," where the precise question, as here involved, was under consideration. The Court says, at page 713:

"The company introduced in evidence its published tariff,
6 which was certified by the Secretary of the Interstate Commerce Commission to have been the tariff in effect at the date of the receipt. The provisions of the receipt are in conformity with the tariff so approved.

"The court ruled and charged the jury that, to be binding upon the plaintiff, the receipt must have been signed by him, unless he misled the agent into believing that the value of the package did not exceed $50. This was error. Acceptance of the receipt, under the circumstances stated, was sufficient to make its provisions binding upon plaintiff. New York Central & Hudson River R. R. Co. v. Peaham 242 U. S. 148, 37, Sup. Ct. 43, 61 L. Ed. 210; American Express Co. v. United States Horse Shoe Co. 244 U. S. 58, 37 Sup. Ct. 505, 61 L. Ed. 990. Plaintiff is conclusively presumed to have known the provisions of the tariff. The contract was plainly one for limited liability within the provisions of the law, and recovery must be limited accordingly.

"It only remains to consider plaintiff's contention that the provisions of the act of Congress of August 9, 1916 (39 Stat. 441, c. 301), are not applicable, because the tariff had not been filed in strict accordance with the provisions of the act, in that there had been no order of the commission which expressly authorized or required the company to establish and maintain rates dependent upon the value declared in writing by the shipper, or agreed upon in writing as the released value of the property, etc., and that no tariff had been filed

which specifically referred to such an order as authority for it, as required by that act, and that under the previously existing law, the act of March 4, 1915 (38 Stat. 1196, c. 176), defendant is
77 liable for the full value, notwithstanding the limitations of liability contained in the receipt."

In the case of Atchison, Topeka & Santa Fe Railway Company vs. Robinson, 233 U. S. 173, Mr. Justice Day, speaking for a unanimous Court, states the rule to be:

"That the effect of the Carmack Amendment to the Hepburn Act. sec. 20, act of June 29, 1906, c. 3591, 34 Stat. 584, 593, was to give to the Federal Jurisdiction control over interstate commerce and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce has been so recently and repeatedly decided in this court as to require now little more than a reference to some of the cases. Kansas City Southern Ry. Co. v. Harriman, 227 U. S. 657; Chicago, Rock Island & Pacific Ry. Co. v. Cramer, 232 U. S. 490; Great Northern Ry. Co. v. O'Connor, 232 U. S. 508. We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt *to* rebating or false billing. Great Northern Ry. Co. v. O'Connor, supra. To give to the oral agreement upon which the suit was brought, the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally ob-
78 served by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission. Kansas City Southern Ry. Co. v. Carl, supra, p. 652. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act.

See also Adams Express Company v. Croninger, 226 U. S. 491, and especially pages 510, 511, where Mr. Justice Lurton, speaking for the Court, says:

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of that contract of transportation, between the parties to that contract. The carrier must respond for negligence

up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy.

79 On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

See also the case of Mo. Kans. & Tex. Ry. vs. Harriman, 227 U. S. 657-672.

The recent case of Union Pacific Railroad Company vs. Burke, decided February 28, 1921 (U. S. Sup. Court Advance Opinion, the Lawyers Co-op. Publishing Company, issued April 1, 1921) announces the doctrine as follows:

"In many cases, from the decision in Hart v. Pennsylvania R. Co. 122 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, decided in 1884, to Boston & M. R. Co. v. Piper, 246 U. S. 439, 62 L. ed. 820, 38 Sup. Ct. Rep. 354, Ann. Cas. 1918E, 469, decided in 1918, it has been declared to be the settled Federal law that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property.

"As a matter of legal distinction, estoppel is made the basis of this ruling,—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained,—but the rule and the effect of it are clearly established."

80 The terms and conditions of the uniform express receipt are binding upon the shipper and carrier alike, relative to the shipment in question, notwithstanding such receipt was not signed by the shipper.

We respectfully submit that the opinion of this Court is erroneous for the following reasons:

Both the carrier and shipper are bound by the terms and provisions of the Uniform Express Receipt filed with and approved by the Interstate Commerce Commission, independent of whether a receipt was in fact issued or not.

" 'Where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of such bill of lading, and the liability of the Company to such shipper is the same liability as if imposed in favor of the lawful holder of a receipt or bill of lading.' The clause in question then was binding on both parties." Standard Combed Thread Company vs. Pennsylvania Railroad Company, 95 Atl. 1002 (N. J. Court of Error and Appeals).

The Supreme Court of North Carolina, in its opinion rendered October 3rd, 1917, in the case of Bryan et al vs. Louisville & N. Railway Company, 93 S. E. 750, says:

"But the contract of shipment would be just what is prescribed by Federal law, notwithstanding any oral agreements at variance with the bill of lading, for common carriers engaged in Interstate Commerce are prohibited from changing that contract or entering
81 into any other; the object being to make all such contracts uniform throughout the United States."

The tariffs filed with the Interstate Commerce Commission, by the plaintiff in error here, provide that unless a greater value is declared the Company will be not liable for more than fifty cents (50 cents) per pound for shipments in excess of 100 pounds weight, unless a greater value is declared.

In this case it is agreed and stipulated:

"that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant Company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission, at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission, April 2, 1917, by supplemental order No. 18, and the defendant thereupon introduced in evidence a certified copy of said order." (Printed Record page 14.)

It is true that our brief filed upon the hearing in this cause refers to decisions rendered prior to the Act of Congress of August 9, 1916. Yet, we respectfully urge that the language of Mr. Justice Lurton, in Kansas City Southern Railway Company vs. Carl, 227 U. S. 639, is now pertinent to the prioer construction of said Statute, wherein it is said:

82 "He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station.

"It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accident- misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carried may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. Texas & Pacific Railway v. Mugg, supra. Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. Illi-

nois Central Railroad v. Henderson Elevator Company, 226 U. S. 441. Nor can a carrier legally contract with a particular shipper for an unusual service unless he make and publish a rate for such service equally open to all. Chicago & Alton Railway v. Kirby, supra.

"That the valuation and the rate are dependent each upon the other is an administrative rule applied in reparation proceedings by the Interstate Commerce Commission. Southern Oil Company v. Southern Railway Co., 19 I. C. C. Rep. 79; Miller & Lux v. Southern Pacific Company, 20 I. C. C. Rep. 129."

In this case the plaintiff paid the normal rate which
83 carried the limitation or released value. (Record p. 15.)

In the recent case of Shoyer vs. Chicago etc. Ry. 222 S. E. 1095 (Commission of Appeals of Texas, Section B, June 23, 1920), the Court reserves the judgment of the Court of Civil Appeals and affirms the judgment of the Trial Court. The opinion states:

"Every shipper is charged with notice of the terms of the interstate tariffs governing his shipments."

Citing Adams etc. v. Croninger, 226 U. S. 491 and other Federal decisions.

The Court in its opinion, further says:

"therefore the right or power to discriminate between shippers in any matter relating to interstate shipments was taken away by the Federal statute, and no carrier can waive any requirements of the Statute or any stipulation of any contract made pursuant thereto."

We regret that the limited time at our disposal, since learning of this Court's contemplated adjournment on the 10th inst., has not permitted fuller discussion of some of the questions here involved, or to present same in such manner as we would otherwise wish to do.

In conclusion, we respectfully urge:

First. That the Act of Congress, passed August 9, 1916, known as the "Second Cummins Amendment" does not impose upon the carrier, liability "for such full and actual loss, damage or injury, in the case of any particular shipment, unless it takes from the
84 shipper a written declaration of the value of the property, or a written agreement with him upon the released value thereof, signed by him."

Second. That acceptance of the receipt by the shipper, under the circumstances in this case, was sufficient to make its provisions binding upon him.

Third. That if the defendant Company remains liable for full actual, loss damage or injury in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him, upon the released value thereof, the written receipt, when delivered to and accepted

by the plaintiff herein, became at once the contract, govering the carriage of the goods, as well as the receipt for the goods so received.

Fourth. The Uniform Express Receipt, as set forth in the tariff authorized by the Interstate Commerce Commission, and duly filed and published, governing the shipment in suit, is the contract between the plaintiff and defendant in this case.

In submitting this case for further consideration, we feel that the Court will give due consideration to the questions herein suggested, regardless of the opinion heretofore filed herein, and that this Court will not be influenced, to use the language of Lord Bacon, by any of the "idols of preconceived opinions."

Respectfully submitted,

STAIGE DAVIS,
C. N. DAVIS,
Attorneys for Petitioner.
A. M. HARTUNG,
DAVIS & DAVIS,
Of Counsel.

85 At another day, to-wit, on the 11th day of May, 1921, the following order was made and entered:

4221.

A. J. LINDENBURG

vs.

AMERICAN RAILWAY EXPRESS COMPANY.

From Kanawha County.

The Court, having maturely considered the petition for reargument and rehearing filed in the foregoing case, is of opinion to and hereby doth refuse the prayer of said petition, and doth order that the final judgment entered in said case on a former day of the present term of this Court be made absolute and be certifiel as heretofore directed.

At another day, to-wit, on the 17th day of May, 1921, the following order was made and entered:

4221.

A. J. LINDENBURG, Plaintiff Below, Defendant in Error,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, Defendant Below, Plaintiff in Error.

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Kanawha County Rendered on the 15th Day of October, 1920.

This day came the American Railway Express Company, by its attorneys, and informed the Court that it desired to present a petition to the Supreme Court of the United States for a writ of error, or writ of certiorari, or both, to the final judgment of this Court, entered on the 19th day of April, 1921, and moved the Court for an order suspending the execution of said final judgment, and to stay the mandate herein, for a period of ninety (90) days from the 17th day of May, 1921, which motion is granted, and it is ordered that, upon the said American Railway Express Company, or some one on its behalf, executing bond in the penalty of Fifteen Hundred Dollars, conditioned according to law, before the Clerk of this Court, with surety to be approved by him, within ten days, execution and further proceedings on said final judgment be and the same hereby are suspended for a period of ninety days from the 17th day of May, 1921, and that the mandate be stayed during such time.

86 STATE OF WEST VIRGINIA:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of the State of West Virginia, do hereby certify that the foregoing is a true and complete transcript of the record in the case of A. J. Lindenburg vs. American Railway Express Company, pending in my said Court upon a writ of error and supersedeas to a judgment of the Circuit Court of Kanawha County, as fully as the same appears upon the records of my said office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 8th day of July, 1921, and in the 59th year of the State.

[Seal of Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals,
By R. A. POFFENBARGER,
Deputy Clerk Supreme Court of Appeals.

Filed Oct. 28, 1921. Wm. B. Mathews, Clerk of the Supreme Court of Appeals.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Being informed that there is now pending before you a suit in which American Railway Express Company is plaintiff in error, and A. J. Lindenburg is defendant in error, No. 4221, which suit was removed into the said Supreme Court of Appeals by virtue of a writ of error to the Circuit Court of Kanawha County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,406. Supreme Court of the United States, No. 451, October Term, 1921. American Railway Express Company vs. A. J. Lindenburg. Writ of Certiorari.

STATE OF WEST VIRGINIA:

In the Supreme Court of Appeals, Charleston.

To the Supreme Court of the United States of America, Greeting:

In obedience to the command of your Honorable Court pertaining to things to be done in the case of A. J. Lindenburg vs. American Railway — Company, now pending before your said Court, I beg to advise that the parties, by counsel, have this day filed in my office the following stipulation in writing:

"In the Supreme Court of the United States, October Term, 1921.

No. 451.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Petitioner,

vs.

A. J. LINDENBURG, Respondent.

It is hereby stipulated and agreed by and between the said American Railway Express Company, petitioner, and the said A. J. Lindenburg, respondent, that the certified transcript of the record on file in the office of the Clerk of the Supreme Court of the United States can be taken as a return to the Writ of Certiorari allowed by the Supreme Court of the United States, at Washington, District of Columbia, on the 22nd day of October, 1921.

Dated Charleston, West Virginia, October 28, 1921.

D. C. T. DAVIS, JR.,
A. M. HARTUNG,
STAIGE DAVIS,
Attorneys for American Railway Express Company, Petitioner.

WM. GORDON MATHEWS,
E. B. DYER,
MORGAN OWEN,
Attorneys for A. J. Lindenburg, Respondent.

To the Clerk of the Supreme Court of Appeals of the State of West Virginia."

And hereby tender same as full compliance with the terms of your said writ.

In witness whereof, I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of the State of West Virginia, have hereunto set my hand and affixed the seal of said Court this 28th day of October, 1921, and in the 59th year of the State.

[Seal of Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals.

[Endorsed:] File No. 28,406. Supreme Court U. S. October Term, 1921. Term No. 451. American Ry. Express Co., Petitioner, vs. A. J. Lindenburg. Writ of certiorari and return. Filed Nov. 4, 1921.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 138

AMERICAN RAILWAY EXPRESS COMPANY, A CORPORATION,
Petitioner,

vs.

A. J. LINDENBURG,
Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

BRIEF ON BEHALF OF AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER.

The Rotwell Print Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

SUBJECT INDEX OF BRIEF.

CASES CITED.

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 451.

AMERICAN RAILWAY EXPRESS COMPANY, a corporation,
Petitioner,
vs.
A. J. LINDENBURG,
Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

BRIEF ON BEHALF OF AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER.

Statement of the Case.

This is an action in assumpsit brought by A. J. Lindenburg against the American Railway Express Company to recover the value of certain goods and chattels delivered to a driver of the defendant company on or about the 22nd day of July, 1918, at Indianapolis, Indiana, to be carried by the defendant company to Charleston, West Virginia, charges for such transportation to be collected at the point of destination. The shipment consisted of one trunk, weighing 200 pounds, another trunk

weighing 100 pounds, and a certain package weighing 10 pounds. There was issued by the defendant to the plaintiff, at the time of the delivery of the said goods and chattels, a receipt, as set forth in the record herein; the value of said goods so delivered to the defendant was not stated by the plaintiff, nor the value demanded by the defendant; the goods were afterwards delivered to the plaintiff at Charleston, but one trunk weighing 200 pounds was delivered in bad order, certain of the goods being totally and others partially damaged by flooding while delayed en route, the actual damage to said goods in the trunk amounting to $916.15.

The receipt and form of receipt introduced as plaintiff's Exhibits 1 and 2 were old forms, which had been used by other companies doing business previous to the time of the delivery of the shipment in question to the defendant (Record, pp. 12-15). At the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant Company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission April 2, 1917, by supplemental order No. 18, as set forth in defendant's Exhibit No. 1, in the record in this case; said tariff was in effect on the line of the defendant company between Indianapolis, Indiana, and Charleston, West Virginia, at the time of the transportation of the shipment in question. Under the provisions of the Uniform Express Receipt, prescribed by the Interstate Commerce Commission under the authority of the Acts of Congress, and duly filed with the Interstate Commerce Commission by the defendant as a part of its tariffs, and in effect at the time of said shipment, the defendant is not liable for any greater amount than $50.00 for any shipment of 100 pounds or less, and not exceed-

ing 50¢ per pound actual weight on any shipment in excess of 100 pounds, unless a greater value is stated by the shipper and paid for under the provisions of the said tariff. The amount charged to, and collected from, the plaintiff on account of the transportation of all of said property was the following:

> For a certain trunk weighing 200 pounds, delivered on the 24th day of August, $3.52 and 18¢ war tax.
>
> For a certain trunk weighing 100 pounds, delivered on the 22nd day of August, $1.76 and 9¢ war tax.
>
> For the package weighing 10 pounds, delivered August 6th, 42¢ and 3¢ war tax (Record, pp. 9-11);

that is, the normal charges on the basis of the primary valuation of fifty cents per pound.

Defendant's Exhibit No. 1, containing certified copy of Tariff and form of receipt, authorized by the Interstate Commerce Commission, is found in Printed Record, pages 15 to 20.

The defendant company filed its Special Plea in writing, setting forth the provisions of the Uniform Express Receipt, prescribed by the Interstate Commerce Commission under the authority of the Acts of Congress and accepted and filed with the Interstate Commerce Commission by the defendant as a part of its tariff, which were in force and effect at the time of the said shipment, and alleging that the liability of the defendant company could not in any event exceed the sum of $110.00, which sum was tendered with said plea (Record, pp. 11, 12).

The matters in controversy between the plaintiff and the defendant were submitted to the Court in lieu of a jury, and after the introduction of all of the evidence as shown in the order of the Circuit Court, entered on the 15th day of October, 1920, the Court held that the defendant's special plea was not good, and entered an order of judgment in favor of the plaintiff and against the defendant in the sum of $916.15, with interest from said

date, together with the costs, to which judgment of the Court the defendant objected and excepted (Record, pp. 9-11).

And thereupon the defendant moved the Court to set aside its findings for the plaintiff upon the sufficiency of the said special plea, and its findings for the plaintiff upon the evidence in this case, and to award the defendant a new trial, but the Court did refuse to set aside its findings for the plaintiff upon the sufficiency of said special plea, and did likewise refuse to set aside its findings for the plaintiff upon the evidence in this case, and did likewise refuse to award the defendant a new trial, to which action of the Court the defendant objected and excepted.

Thereupon the defendant Company prosecuted a writ of error and supersedeas in the Supreme Court of Appeals of West Virginia, which Court, upon full hearing of the matters arising upon said writ of error and supersedeas, affirmed the judgment of the Circuit Court of Kanawha County by its order and opinion filed therewith on the 19th day of April, 1921 (Record, pp. 34 to 39).

Thereupon the American Railway Express Company filed its petition for reargument and rehearing in said Supreme Court of Appeals of West Virginia, on the 10th day of May, 1921, and in its said petition averred that the said opinion and decision of said Supreme Court of Appeals of West Virginia, rendered in said cause on the 19th day of April, 1921, "denies this petitioner, and is against the right, privilege and immunity, especially set up and claimed by this petitioner under the Statute of the United States of America, known as the 'Second Cummins Amendment' to the Interstate Commerce Act, as set forth in the Act of Congress of the United States passed August 9, 1916, as aforesaid" (Record, pp. 39-40).

The said Supreme Court of Appeals, upon consideration thereof, refused the prayer of said petition and ordered that the judgment theretofore entered in said

case be made absolute, and certified, as theretofore directed (Record, p. 52).

This petitioner thereupon filed in this Court its petition for a writ of certiorari to the final judgment of said Supreme Court of Appeals of West Virginia, which was duly allowed on the 22nd day of October, 1921.

Specification of Errors.

It is submitted that the said Supreme Court of Appeals of West Virginia erred in entering the final judgment in this case on the 19th day of April, 1921, which was made absolute by an order thereafter entered by said Supreme Court of Appeals of West Virginia on the 11th day of May, 1921, and by which final judgment the said Supreme Court of Appeals of West Virginia affirmed and sustained the judgment of the Circuit Court of Kanawha County, West Virginia, made and entered in this case on the 15th day of October, 1920, in the following particulars, to-wit:

1. The said Supreme Court of Appeals of West Virginia erred, to the prejudice of this petitioner, in holding and deciding that this petitioner omitted to avail itself of the right of limitation, in respect of the shipment in question, by its failure to comply with the regulation provided for effectuation thereof (Record, p. 36).

2. The said Supreme Court of Appeals of West Virginia erred to the prejudice of this petitioner, in holding that because this petitioner in this instance did not take from the shipper a written declaration of value nor a written agreement as to value "signed by him", it failed to place itself within the requirements of the statute and the regulations of the Interstate Commerce Commission prescribed thereunder. In other words, did not comply with the conditions precedent to its right to carry the property under a limitation of liability.

3. The said Supreme Court of Appeals of West Virginia erred, to the prejudice of this petitioner, in holding and deciding that this petitioner should have given to the shipper, A. J. Lindenburg, a receipt specifying a value fixed by himself "and evidenced by his signature" (Record, pp. 27, 38), and failing to do so, it denied him the option as to value contemplated by law.

4. The said Supreme Court of Appeals of West Virginia erred, to the prejudice of this petitioner, in holding and deciding that it neglected to avail itself of the right conditionally conferred upon it by the statute and the regulations, by its failure to take the shipper's written declaration or agreement as to value; that "a writing not signed by him, although specifying value, was not a declaration or agreement in writing by him" (Record, p. 38).

5. The said Supreme Court of Appeals of West Virginia erred to the prejudice of this petitioner in holding and deciding that to effectuate the purpose of the statute, it has been deemed necessary to require the carrier in every instance to allow the shipper an opportunity to elect what value he will place upon his property by taking his statement as to it, writing it in the receipt and requiring him to sign it.

6. The said Supreme Court of Appeals of West Virginia erred, to the prejudice of this petitioner, in holding and deciding that, under the Act of Congress passed August 9, 1916, known as the "Second Cummins Amendment" to the Interstate Commerce Act, even though the Interstate Commerce Commission, under the authority conferred upon it by said statute, has adopted and promulgated regulations by which such limitation of liability may be effected as to all property in interstate shipment, except ordinary live stock, and in compliance with such

regulations, a carrier has filed and published, and put into effect, its tariffs and rules for maintenance of rates dependent upon value declared in writing by the shipper, or agreed upon in writing as the released value of the property approved by said Commission, it remains liable for such full, actual loss, damage or injury, in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him, upon the released value thereof "signed by him" (Record, p. 35).

7. The said Supreme Court of Appeals of West Virginia erred, to the prejudice of this petitioner, in holding and deciding that the said Act of Congress, passed August 9, 1916, so interpreted, does not conflict with the provisions of the Interstate Commerce Act, inhibiting preferences and unjust discrimination, nor is it inconsistent with them or either of them (Record, p. 36).

Brief of the Argument.

This petitioner seeks to challenge by this writ, the final judgment of the Supreme Court of Appeals of the State of West Virginia, and the reasons therefor given in the written opinion filed and entered by said Court in support of said judgment, whereby the said Court construes the Act of Congress passed August 9, 1916, 8 Compiled Statutes, Section 8604-*a*. and known as the "Second Cummins Amendment" to the Interstate Commerce Act, to impose upon a common carrier, liability to the lawful holder of a receipt or bill of lading for property delivered to such common carrier for transportation in Interstate Commerce, for the full actual loss, damage or injury to such property, unless such common carrier "takes from the shipper a written declaration of the value of the property, or written agreement with him, upon the released value thereof, *signed by him*" (italics ours), not-

withstanding that The Interstate Commerce Commission, under the authority conferred upon it by said Statute, has adopted and promulgated regulations by which limitation of liability may be effected, and in compliance with such regulations the carrier has filed and published and put into effect its tariffs and rules for maintenance of rates dependent upon value declared in writing by the shipper, or agreed upon in writing as the released value of the property, approved by said commission; that in such case the delivery to the shipper of a receipt executed by the carrier, in which there is no statement of value signed by the shipper, does not relieve the carrier from liability based upon full actual value, even though the rate charged for carriage of the property is the same as would have been legally charged upon the minimum value of the property, under the regulations and tariffs validly promulgated, posted and maintained (Record, p. 35).

The syllabus of the points adjudicated and the opinion of the Court is found in Printed Record, pages 35 to 39.

The Constitution of West Virginia, Article VIII, Section 5, provides:

> "When a judgment or decree is reversed or affirmed by the supreme court of appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case."

The specifications of error Nos. 1, 2, 3, 4, 5, 6, *supra,* challenge the construction given by the Supreme Court of West Virginia to the Act of Congress passed August

9, 1916, known as the "Second Cummins Amendment" to the Interstate Commerce Act, and said errors, and each of them, call in question the correctness of the decision of said Court in the matter of compliance by this petitioner with the provisions of said Act, relative to the limitation of value in respect to the shipment in question, and may, therefore, be discussed with less prolixity together, rather than *seriatim*. In brief, the Court holds, as set forth in said specifications of error, that this petitioner may not avail itself of the right of limitation in respect of the shipment in question because of its failure to comply with the regulation provided for effectuation thereof (Record, p. 36); that because this petitioner in this case did not take from the shipper a written declaration of value, nor a written agreement as to value, "signed by him", it failed to place itself within the requirements of the statute and the regulations of the Interstate Commerce Commission, prescribed thereunder (Record, p. 37); that this petitioner did not comply with the conditions precedent to its right to carry the property under a limitation of liability, in that it should have given the shipper a receipt specifying a value fixed by himself and "evidenced by his signature" (Record, pp. 37, 38); that this petitioner neglected to avail itself of the right conditionally conferred upon it by the statute and the regulations, by its failure to take the shipper's written declaration or agreement as to value, and that "a writing not signed by him although specifying value, was not a declaration or agreement in writing by him" (Record, p. 38); that even though the Interstate Commerce Commission, under the authority conferred upon it by said statute, has adopted and promulgated regulations by which such limitation of liability may be effected as to all property in interstate shipment, except ordinary live stock, and in compliance with such regulations, a carrier has filed and published and put into effect, its tariffs and rules for the maintenance of rates dependent upon value

declared in writing by the shipper, or agreed upon in writing as the released value of the property, approved by said Commission, it remains liable for such full, actual loss, damage or injury, in the case of any particular shipment, unless it takes from the shipper a written declaration of the value of the property, or a written agreement with him upon the released value thereof, "signed by him" (Record, p. 35).

We earnestly submit that the construction given the Act of Congress of August 9, 1916 ("Second Cummins Amendment" to the Interstate Commerce Act) by the Supreme Court of Appeals of West Virginia, as set forth in its said opinion, is erroneous. By said Act it is provided that any common carrier, railroad or transportation company, subject to the provisions thereof

> "shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation Company to which such property may be delivered, or over whose line or lines such property may pass within the United States * * * and no contract, receipt, rule, regulation or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed, and any such common carrier * * * so receiving property for transportation * * * shall be liable to the lawful holder of said receipt or bill of lading, or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the actual loss, damage or injury to such property, caused by it or by any such common carrier, railroad or transportation Company, to which such property may be delivered * * * notwithstanding any limitation of liability or limitations of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation or in any tariff, filed with the Interstate Commerce Commission; Provided, however, That the

provisions hereof, respecting liability for full actual loss, damage or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except, ordinary live stock, received for transportation, concerning which the carrier shall have been, or shall hereafter be, expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not as far as relates to values, be held to be a violation of Section 10, of this Act, to regulate commerce, as amended, and any tariff schedule which may be filed with the Commission, pursuant to such order, shall contain specific reference thereto and may establish rates, varying with the value so declared or agreed upon; and the Commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion be just and reasonable under the circumstances and conditions surrounding the transportation."

The Supreme Court of Appeals of West Virginia predicated its decision upon the failure of the American Railway Express Company to take

> "from the shipper a written declaration of the value of the property, or a written agreement with him, upon the released value thereof, **signed by him**" (Record, p. 35, Syllabus Point 2).

which the opinion also states:

> "the law in force at the date of the shipment required" (Record, p. 36).

The language of the said Act of Congress is:

> "dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property."

The Provisions of the Second Cummins Amendment have been Complied with by the Petitioner; the Terms and Conditions of the Contract of Shipment are Valid and Binding and Should be Enforced.

a. *The petitioner has met the requirements of the statute.*

In this case it is agreed and stipulated:

> "that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant Company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission, at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission, April 2, 1917, by supplemental order No. 18, and the defendant thereupon introduced in evidence a certified copy of said order." etc. (Record, p. 10).

It is also clearly established by the record in this case that the defendant carrier had, in pursuance of the provisions of the "Second Cummins Amendment", secured the authority of the Interstate Commerce Commission to establish and maintain rates dependent upon and varying with the declared or released value of the property, and that it had prepared and filed with the Interstate Commerce Commission its Official Classification, Tariffs and Uniform Express Receipt in accordance therewith. This is recited in the order of the trial Court, Record,

page 10. The presumption is that such tariffs and Uniform Express Receipt were filed at Indianapolis, Indiana, at which point the plaintiff made the shipment in question, in this case. This Court, speaking through Mr. Justice McReynolds, in the case of *Cincinnati & Tex. Pac. Ry.* vs. *Rankin,* 241 U. S. 319, page 327, held:

> "We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*' Bank of the United States *v.* Dandridge, 12 Wheat. 64, 69-70; Knox County *v.* Ninth National Bank, 147 U. S. 91, 97; Maricopa & Phœnix R. R. *v.* Arizona, 156 U. S. 347, 351; Sun Publishing Assn. *v.* Moore, 183 U. S. 642, 649."

b. *The express receipt is a written contract.*

The printed form of Express Receipt is an agreement in writing, *Matter of Benson,* 34 Fed. 649; *Benson* v. *McMahon,* 127 U. S. 457, 468, 469; *Commonwealth* v. *Ray,* 69 Mass. pp. 441, 447; *Frashier* v. *State,* 159 Ala. 1, 47 South Rep. 245; *Chaffin* v. *Lynch,* 83 Va. 106, 1 S. E. 803, 807; *Johnson* v. *State,* 69 Ala. 593, 596; *Horner* v. *Missouri Pac. Ry. Co.,* 70 Mo. App. 285, 291; *American*

Mutoscope & Biograph Co. v. *Edison Mfg. Co.,* 137 Fed. 262, 265.

Abbott's Law Dictionary, page 659, defines "write":

> "To express thought by visible words; to impress or mark letters communicating ideas with coloring matter, upon paper or parchment, by means of pen, pencil or types * * * In the vernacular, 'to write' and 'writing' are in contrast with 'to print' and 'printing', but in law the latter are included in the former."

In *Michigan Central R. R. Co.* v. *Chicago Electric Vehicle Co.,* 124 Ill. App. 158, 160, it was held that a shipping order signed by the shipper and accepted by the Railroad Company became "a contract in writing" between the parties as fully and completely as if the carrier had signed its acceptance in writing, the court citing three earlier cases in the Supreme Court of Illinois, to the effect that a contract signed by one party, if accepted by the other, is binding on both; that the signature of both parties is not always a necessary requisite to a written contract is established. Other cases cited to this effect are: *National Cash Register Co.* v. *Lesko,* 77 Conn. 276, 58 Atl. 967, 968; *Schnurr* v. *Quinn,* 82 N. Y. Supp. p. 468; *Sellers* v. *Greer,* 50 N. E. 246; *Harts* vs. *Emery,* 56 N. E. 866.

In *McDermott* vs. *Mahoney,* 139 Iowa, 292, 298, 115 N. W. 32, 35, the court held:

> "A written instrument purporting to set forth the mutual obligations of a contract, which though unilateral in form and signed by one party only, is by him delivered to the other and accepted as the contract between the parties, is a written contract. Where a written agreement signed by one party is accepted and adopted by the other, and acted upon, it becomes their contract in the same sense as though both parties had signed it."

c. *The signature of the shipper was not required.*

The Supreme Court of Appeals of West Virginia refused to give effect to the terms of the contract of shipment because it was not signed by the shipper, which signature it construed the Second Cummins Amendment to require. But that act does not require the signature of the shipper, and it would seem that the Supreme Court of Appeals of West Virginia inferred such requirement from the fact that the form embodied in the order of the Interstate Commerce Commission "In The Matter of Express Rates, Practices, Accounts, and Revenues, Released Rates", of April 2, 1917, provides spaces for the value and the signature of the shipper (Record, pp. 28, 30), and it is apparent that the Court did not consider the opinion of the Interstate Commerce Commission, pursuant to which the order just referred to was made, in which it appears that the Uniform Express Receipt adopted by the Commission was the one presented by the Express Companies to the Commission for its approval and authority, and that nothing in said opinion of the Commission, or in its order, requires the signature of the shipper to the agreement or declaration of value, 43 I. C. C., page 510; nor the subsequent opinion of the Interstate Commerce Commission In The Matter of Bills of Lading, 52 I. C. C. 671, in which it stated that,

> "it is sufficient if the shipper accepts the carrier's bill of lading without himself signing it."

That proceeding was a general inquiry by the Commission into the subject of the form and substance of bills of lading, and of the practice of carriers in respect to the issuance, transfer and surrender thereof, in which the Commission very exhaustively reviewed and considered the common law affecting bills of lading and its modifica-

tions by the Federal statutory law, including the Carmack amendment to Section 20 of the Act to Regulate Commerce, and the First and Second Cummins Amendments, and in which in discussing the nature and functions of the bill of lading it stated, at page 681:

> "An important function of the bill of lading is to give formal expression to the stipulations and conditions under which the carrier seeks to obtain a modification or limitation of the liability that otherwise would be imposed upon it under the common law. While the limitations of the carrier's liability must be agreed to by the shipper, and the agreement be invested with the sanctity of a valid contract, neither by common law nor by federal statute in this country is any particular form of contract or solemnity of execution required. * * * It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading."

In reaching this conclusion the Commission gives expression to a rule that is well established by a long line of decisions in the federal and state courts. For it is well settled that in the absence of a statute requiring it, the signature of a shipper is not necessary to bind him to the terms of a bill of lading or express receipt. *Adams Express Company* v. *Carnahan*, 63 N. E. 245; *Mouton* v. *Louisville, etc., R. R. Co.*, 128 Ala. 537; *St. Louis, etc., Ry. Co.* v. *Weakly*, 50 Ark. 397, 8 S. W. 134; *Michalitschke* v. *Wells Fargo & Co.*, 118 Cal. 683; *Overland Mail, etc., Co.* v. *Carroll*, 7 Colo. 43; *Galt* v. *Adams Express Co.*, 4 McAr. 124, 48 Am. Rep. 742; *Mulligan* v. *Illinois Central R. Co.*, 36 Iowa, 181; *The Henry B. Hyde*, 82 Fed. Rep. 681; *Hohl* v. *Norddeutscher Lloyd*, 175 Fed. 544; *Mariani Bros.* v. *Wilson & Sons*, 188 App. Div. (N. Y.), 617.

In *The Henry B. Hyde, supra,* Judge De Haven speaking for the court says at page 683:

> "It is the rule, rather than the exception, for common carriers to stipulate for a release from the stringent liability of an insurer, and which otherwise the law would impose upon them; and according to the customary course of business such stipulations are contained in the bill of lading issued by the carrier. This custom is so general that all persons receiving such bills of lading must be presumed to know of such custom, and they are also charged with the knowledge that it is one of the offices of such instruments to state the terms and conditions upon which the goods therein described are to be carried; and for this reason the acceptance of such a paper by the shipper, without dissent, at the time of the delivery of his goods for shipment, when no fraud or imposition has been practiced upon him, is to be regarded as conclusive evidence that he agrees to be bound by all lawful stipulations contained in such bill of lading, and this I understand to be the rule sustained by the supreme court of the United States in the case of *Bank of Kentucky* v. *Adams Express Co.*, 93 U. S. 174, and is supported by the following well-considered cases: *Kirkland* v. *Dinsmore*, 62 N. Y. 171; *Grace* v. *Adams*, 100 Mass. 505; *Dorr* v. *Navigation Co.*, 11 N. Y. 485; *Railroad Co.* v. *Pontius*, 19 Ohio St. 221; *McMillan* v. *Railroad Co.*, 16 Mich. 79. In the case last cited, Mr. Justice Cooley, speaking for the court, said:
>
> > 'Bills of lading are signed by the carrier only; and, where a contract is to be signed only by one party, the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it. This is the case with deeds poll, and with various classes of familiar contracts; and the evidence of assent derived from the acceptance of the contract without objection is commonly conclusive. I do not perceive that bills of lading stand upon any different footing.' "

In *Richmond & Alleghany R. R. Co.* vs. *Patterson Tobacco Co.*, 169 U. S. 311, there was involved a statute of

Virginia which provided that a common carrier accepting property for delivery beyond its own line, could limit its liability to its own line only by an agreement in writing, signed by the shipper or his agent. The only point decided in the case was that such a statute was not repugnant to the Commerce Clause of the Federal Constitution. In the later case of *M. K. & T. Ry. Co.* vs. *McCann,* 174 U. S. 580, this Court, speaking through Mr. Justice White, at page 590, held:

> "Such was the exact condition in the Patterson case, *supra,* for it cannot be doubted that if in that case there had been no statute requiring the signature of the shipper to a contract limiting liability, a contract not signed by the shipper containing an exemption would have been efficacious."

In the case of *Tribble* vs. *Southern Express Company,* 111 S. C. 31, 96 S. E. 712, the construction of the "Second Cummins Amendment" and the precise questions here involved were under consideration. The Court held:

> "The company introduced in evidence its published tariff, which was certified by the Secretary of the Interstate Commerce Commission to have been the tariff in effect at the date of the receipt. The provisions of the receipt are in conformity with the tariff so approved.
>
> "The Court ruled and charged the jury that, to be binding upon the plaintiff, the receipt must have been signed by him, unless he misled the agent into believing that the value of the package did not exceed $50. This was error. Acceptance of the receipt, under the circumstances stated, was sufficient to make its provisions binding upon plaintiff. *New York Central & Hudson River R. R. Co.* v. *Beaham,* 242 U. S. 148, 37 Sup. Ct. 43, 61 L. Ed. 210; *American Express Co.* v. *United States Horse Shoe Co.,* 244 U. S. 58, 37 Sup. Ct. 595, 61 L. Ed. 990. Plaintiff is conclusively presumed to have known the provisions of the tariff. The contract was plainly one for a limited liability, within the provisions of the law, and recovery must be limited accordingly.

d. *The shipper, having accepted the benefits of the contract, and introduced it in evidence is bound by all its terms and conditions.*

The written receipt and contract issued in this case and introduced by plaintiff as establishing his right to recovery ("Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 2", Record, pages 12 to 15 inclusive), signed by the American Railway Express Company, through its agent, Sigman, and delivered to and accepted by the plaintiff, contains a provision limiting the carrier's liability to $50.00 upon any shipment of 100 pounds or less, and not exceeding 50 cents per pound upon any shipment weighing more than 100 pounds, unless the just and true value is declared at the time of shipment, and the declared value in excess of the value specified is paid for, or agreed to be paid for, under the Company's schedule for charges for excess value (Record, p. 15).

> "By accepting a receipt which limited the value to $50, and obtaining a corresponding rate, plaintiff agreed by necessary implication that the value of the package did not exceed $50."
>
> *Tribble* v. *Southern Express Co.*, 96 Southeastern, 712.

The plaintiff introduced said contract of carriage in evidence as measuring the rights and liabilities of the parties, relative to such shipment, and must be bound by all of its terms and conditions.

In the case of *Bates* vs. *Wier*, 105 N. Y. Supp. 785, the Court, speaking through Miller, *J.*, says:

> "It contracted to carry and deliver to the plaintiff an article worth $50.00, and became an insurer against everything except the acts of God and the public enemy; but it never assumed that obligation respecting an article valued at $6,000. * * * It is said to be immaterial whether the defendant's obligation was that of an insurer, or simply a bailee for

hire, as a cause of action upon either was established; but this entirely overlooks the fact that the defendant only became a bailee for hire by virtue of the contract, which the plaintiff must accept *in toto* if at all."

In the case of *Brandt* vs. *Public Bank*, 139 App. Div. (N. Y.) 173, plaintiff introduced in evidence, without qualification, a notice to stop payment on plaintiff's check; it was held:

> "The rule is that if a party uses books of account or other papers against his adversary, he makes them evidence for him on the same subject."

See also

Kelly vs. *Dutch Church of Schenectady*, 2 Hill (N. Y.) 105, 111;

Fitch vs. *Mayor, etc., of the City of N. Y.*, 88 N. Y. 500, 502;

Lumber Co. vs. *B. & O. R. Co.*, 71 W. Va. 744.

In accepting the express receipt signed by the Agent of the Express Company, the shipper Lindenburg agreed to limit the liability of this petitioner for the actual loss, damage or injury to the property in question to $50 for 100 pounds or less, and not exceeding 50 cents per pound actual weight for such property in excess of 100 pounds, and upon the delivery of the shipment to him by the carrier, paid the charges on that basis, and thereby secured the transportation of his goods at the lower rate applicable, and the affirmance of the judgment of the Supreme Court of Appeals of West Virginia would permit him to repudiate the agreement and to recover a larger amount on the ground, not that no opportunity was afforded to him to declare a higher value and secure a corresponding measure of liability, nor that he was without knowledge of the terms and conditions of the contract, but solely on the ground that he had failed to sign

the contract which was delivered to him by the Express Company, and which ever since has been continuously in his possession.

That this court would permit such a result seems to us inconceivable. It is contrary to all principles of justice and fair dealing, and contrary to the statutes as they have been construed by this court, if we correctly understand those decisions.

As was stated in the recent case of *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317:

> "In many cases, from the decision in *Hart* v. *Pennsylvania R. Co.*, 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, decided in 1884, to *Boston & M. R. Co.* v. *Piper*, 246 U. S. 439, 62 L. ed. 820, 38 Sup. Ct. Rep. 354, Ann. Cas. 1918 E, 469, decided in 1918, it has been declared to be the settled Federal law that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property.
>
> "As a matter of legal distinction, estoppel is made the basis of this ruling,—that, having accepted the benefit of the lower rate, in common honesty the shipper may not repudiate the conditions on which it was obtained,—but the rule and the effect of it are clearly established."

See also *Adams Express Company* v. *Croninger*, 226 U. S. 491, and especially pages 510, 511, where Mr. Justice Lurton, speaking for the Court says:

> "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on

that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of that contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

See also the case of *Mo. Kans. & Tex. Ry.* vs. *Harriman,* 227 U. S. 657-672.

The Judgment and Decision of the Supreme Court of Appeals of West Virginia Conflicts with the Provisions of the Interstate Commerce Act Inhibiting Undue Preferences and Unjust Discrimination.

To permit the plaintiff in this case to satisfy the judgment complained of, when he had accepted a receipt, by the terms of which he agreed to limit liability of this petitioner, for the actual loss, damage or injury to the property in question to $50.00 for 100 pounds or less, and not exceeding 50 cents per pound actual weight for such property in excess of 100 pounds, and paid the normal charges based upon such valuation, with specific notice that if the true value of the shipment were declared a greater charge would be made for the transportation of said goods, is to afford to this shipper an undue preference in violation of the Act to Regulate Commerce, and to unjustly discriminate against all other shippers of property by express whose recovery is limited to $50.00

on shipments weighing 100 pounds or less, and not exceeding 50 cents per pound of the actual weight of the shipment on shipments weighing in excess of 100 pounds, unless a charge is made for the value of the property in excess of that amount; and permits the shipper to repudiate the conditions on which he obtained the lower rate, and to recover more than the value which he placed upon his property.

In the case of *Atchison, Topeka & Santa Fe Railway Company* vs. *Robinson,* 233 U. S. 173, 180, Mr. Justice Day, speaking for a unanimous Court, states the rule to be:

> "That the effect of the Carmack Amendment to the Hepburn Act, Sec. 20, act of June 29, 1906, c. 3591, 34 Stat. 584, 593, was to give to the Federal jurisdiction control over interstate commerce and to make supreme the Federal legislation regulating liability for property transported by common carriers in interstate commerce has been so recently and repeatedly decided in this court as to require now little more than a reference to some of the cases. Kansas City Southern Ry. Co. *v.* Harriman, 227 U. S. 657; Chicago, Rock Island & Pacific Ry. Co. *v.* Cramer, 232 U. S. 490; Great Northern Ry. Co. *v.* O'Connor, 232 U. S. 508. We regard these cases as settling the proposition that the shipper as well as the carrier is bound to take notice of the filed tariff rates and that so long as they remain operative they are conclusive as to the rights of the parties, in the absence of facts or circumstances showing an attempt to rebating or false billing. Great Northern Ry. Co. *v.* O'Connor, *supra.* To give to the oral agreement upon which the suit was brought the prevailing effect allowed in this case by the charge in the trial court, affirmed by the judgment of the Supreme Court of the State, would be to allow a special contract to have binding force and effect though made in violation of the filed schedules which were to be equally observed by the shipper and carrier. If oral agreements of this character can be sustained then the door is open to all manner of special contracts, de-

parting from the schedules and rates filed with the Commission. Kansas City Southern Ry. Co. *v.* Carl, *supra,* p. 652. To maintain the supremacy of such oral agreements would defeat the primary purposes of the Interstate Commerce Act, so often affirmed in the decisions of this court, which are to require equal treatment of all shippers and the charging of but one rate to all, and that the one filed as required by the act."

In the case of *Kansas City Southern Railway Company* vs. *Carl,* 227 U. S. 639, this Court, speaking through Mr. Justice Lurton, held:

"He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station.

"It would open a wide door to fraud and destroy the uniform operation of the published tariff rate sheets. When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and that carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid. Texas & Pacific Railway *v.* Mugg, *supra.* Nor is the carrier liable for damages resulting from a mistake in quoting a rate less than the full published rate. Illinois Central Railroad *v.* Henderson Elevator Company, 226 U. S. 441. Nor can a carrier legally contract with a particular shipper for an unusual service unless he makes and publish a rate for such service equally open to all. Chicago & Alton Railway *v.* Kirby, *supra.*

"That the valuation and the rate are dependent each upon the other is an administrative rule applied

in reparation proceedings by the Interstate Commerce Commission. Southern Oil Company *v.* Southern Railway Co., 19 I. C. C. Rep. 79; Miller & Lux *v.* Southern Pacific Company, 20 I. C. C. Rep. 129."

In the more recent case of *Western Union Telegraph Company* vs. *Esteve Brothers & Company,* 256 U. S. 566, this Court held, speaking through Mr. Justice Brandeis, at page 571:

"The lawful rate having been established, the company was by the provisions of sec. 3 of the Act to Regulate Commerce prohibited from granting to anyone an undue preference or advantage over the public generally. For, as stated in Postal Telegraph-Cable Co. *v.* Warren-Godwin Lumber Co., *supra,* 30, the 'Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates.' If the general public upon paying the rate for an unrepeated message accepted substantially the risk of error involved in transmitting the message, the company could not, without granting an undue preference or advantage extend different treatment to the plaintiffs here. The limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered."

and again at page 573:

"Plaintiffs insist that it is the filing and subsequent publication of the railroad rate which gives it the force of law and requires the shipper to take notice of it. But the contention, by dwelling unduly upon the procedural features of the act, would defeat the end which Congress had in view. Both railroad and telegraph-cable rates are initiated by the carrier. It is true that a railroad rate does not have the force of law unless it is filed with the Commission. But it is not true that out of the filing of the rate grows the rule of law by which the terms of this lawful rate conclude the passenger. The rule does not rest

upon the fiction of constructive notice. It flows from the requirement of equality and uniformity of rates laid down in sec. 3 of the Act to Regulate Commerce. Since any deviation from the lawful rate would involve either an undue preference or an unjust discrimination, a rate lawfully established must apply equally to all, whether there is knowledge of it or not. Congress apparently concluded, in the light of discrimination theretofore practiced by railroads among shippers and localities, that in transportation by rail equality could be secured only by provisions involving the utmost definiteness and constant official supervision. Accordingly by sec. 6 it forbade a carrier of goods from engaging in transportation unless its rates had been filed with the Commission; and it prohibited, under heavy penalties, departure in any way from the terms of those rates when filed."

If the defendant has been in any respect lacking in the performance of the full duty imposed upon it by law, to limit its liability here, it is in the use of a form of receipt differing in language from the one duly in effect at the time of the movement of the plaintiff's shipment. But insofar as the amount of its liability to this plaintiff is concerned, that slight variation of language is immaterial for neither the shipper nor the carrier could make any agreement either oral or in writing which in any way deviated from the filed tariffs, as has been repeatedly held by this Court, among other cases, in *Chicago & Alton R. R. Co.* v. *Kirby*, 225 U. S. 155; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 653; *Illinois Central R. R. Co.* v. *Henderson Elevator Co.*, 226 U. S. 441; *Louisville & Nashville R. R. Co.* v. *Maxwell*, 237 U. S. 94; *American Express Co.* v. *U. S. Horse Shoe Co.*, 244 U. S. 58; and *P. C. C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. p. 577, in which it is said at page 581:

"However this may be, in our view the question must be decided upon consideration of the applicable provisions of the statutes of the United States regulating interstate commerce. The purpose of the Act

> to Regulate Commerce, frequently declared in the decisions of this court, was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission. In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the Act to secure."

It is respectfully submitted that the petitioner was duly authorized to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property; that the Act of Congress of August 9, 1916, was fully complied with; that the shipper's signature on the receipt was not required by the said Act of Congress of August 9, 1916, and that the shipper having accepted the receipt, and the benefit of the lower rate, is estopped from repudiating the conditions on which it was obtained, and to permit him to recover more than the value which he placed upon his property would be to afford him an undue preference, and to unjustly discriminate against all other shippers in violation of the Act to Regulate Commerce; that the judgment of the said Supreme Court of Appeals of West Virginia made and entered herein is erroneous and should be set aside, reversed and annulled, and the amount of the tender made by this petitioner in the trial court held sufficient, and the limit of this petitioner's liability.

Respectfully submitted,

H. S. MARX,
STAIGE DAVIS,
A. M. HARTUNG,
Attorneys for Petitioner American Railway Express Company.

Supreme Court of the United States

OCTOBER TERM, 1922.

NO. [redacted] 138

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, *Petitioner*,

vs.

A. J. LINDENBURG, *Respondent*.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

BRIEF ON BEHALF OF A. J. LINDENBURG, RESPONDENT.

SUBJECT INDEX OF BRIEF

CASES CITED

Supreme Court of the United States

OCTOBER TERM, 1922.

NO. 451.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, *Petitioner,*

vs.

A. J. LINDENBURG, *Respondent.*

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

BRIEF ON BEHALF OF A. J. LINDENBURG, RESPONDENT.

PROPOSITIONS RELIED UPON FOR AFFIRMANCE OF THE JUDGMENT AND AUTHORITIES IN SUPPORT OF SAME.

The shipment in the case at bar was made in the year 1918 and is governed by the provisions of the Second Cummins Amendment, which is as follows:

> "P. 7976. Bills of lading; limitation on liability; rates dependent on declared value; time for notices, filing claims, or starting suits.—Any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful

holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or

agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary live stock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided, further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage, while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. (Acts Feb. 4, 1887, c. 104, p. 20, 24 Stat. 386; June 29, 1906, c. 3591, p.

7, 34 Stat. 595; March 4, 1915, c. 176, p. 1, 38 Stat. 1196; Aug. 9, 1916, c. 301, 39 Stat. 441.)"

The contention of the respondent is that the petitioner has not complied with the terms, conditions and stipulations of the said Second Cummins Amendment relative to the shipment in question for the following reasons:

FIRST: That it did not issue to the shipper the receipt as required, authorized and prescribed by the Interstate Commerce Commission. (See Record, page 17); But upon the contrary issued a receipt which was unlawful and void under both the Carmack Amendment and the Cummins Amendment, as it was misleading and deceiving to the shipper, as he was not given the option to ship under the rules and regulations prescribed by the Cummins Amendment. (See Receipt, Record, pages 12-13,) and this receipt cannot be considered as being a binding contract between the carrier and the shipper, for the reason

(a) That it limited its liability for loss or damage only on its own line.

> "Under the Carmack Amendment if interstate shipments are received for through transportation and delivery beyond its line by the carrier, any stipulation for exemption from liability for loss or injury due to the default of its agents, the connecting carriers, is void and inoperative."
>
> Corpus Juris, Vol. 10, page 530, Sec. 870-1, also page 543, sec. 896.

"Initial Carrier may not limit its liability to loss or damage occurring on its own line."

Atlantic Coast Line R. Co. v. Ward, 58 So. 677, also note of cases in U. S. compiled statutes 1916, page 9301.

(b) It limited its liability only where the actual value of the property was declared and paid for, which under the Cummins Amendment is void.

(c) There was neither a value declared in writing by the shipper in it or an agreed released value in writing made by the shipper, and it was not signed by the shipper, all of which is required under the Second Cummins Amendment.

"A bill of lading is a contract between the transportation company and him who is interested in the shipment and legal when within the policy and edict of the law regulating the relation."

Michigan Cent. R. Co. v. Mark Owen, 256 U. S. 427.

"An express Company's failure to issue a receipt for an interstate shipment as required by the Carmack Amendment imposes upon such carrier the highest responsibility which the law will imply from the conduct of the parties and the prompt delivery of the shipment to a connecting carrier will not relieve the initial carrier."

Southern Express Co. v. Malone, 78 So. 408.

"The contention of the Company in the above case was that because it violated the act, it was exempt from liability as a common carrier and that it was only liable to one who receives a receipt as provided by

law. The Court said it could not so reward the carrier for its non-observance of the law and that a failure to deliver a receipt as required by the act, imposed the highest responsibility, not the least."

"In the case of Berlinsky vs. Barrett, in 173 N. Y. S. 449, decided January 2nd, 1919, the case was submitted upon the following set of facts:

"'That on or about Sept. 29th, 1917, the plaintiff in this action delivered a package to one of the offices of the defendant at Logan, W. Va.; the said package weighed 270 lbs. and she paid $6.08 charges; that the goods were consigned to the plaintiff in New York and that plaintiff demanded the goods in New York but never received them. It was further stipulated at the request of the defendant that the plaintiff who made the shipment could neither read or write the language; there was also introduced in evidence a blank receipt, which had the same stipulation as the one shown in the case at bar and which stipulation was relied upon as limiting liability. The Court in its opinion, said:

"'There is nothing presented by the record herein which establishes that the parties entered into any special contract limiting the liability of the carrier.'"

"Without any explanatory evidence it is difficult to understand how the defendant can lay claim to a contract in its favor with such a person. Furthermore no evidence of any kind is presented showing that the express company delivered any bill of lading

or receipt to the plaintiff, or that anything was said to her regarding any limitation of liability. No meeting of minds was established upon which the defendant could predicate a contract precluding the plaintiff from recovering more than a stipulated amount.

"The Interstate Commerce Commission on April 2nd, 1917, ordered that the Express Companies could put into effect rates dependent on value declared in *writing* by the shipper or agreed upon in *writing* as the released value."

Williams v. Hartford & N. Y. Trans. Co., 48 I. C. C. 269.

In the case of McCormic vs. Southern Express Co., in 93 S. E. (W. Va.) 1048, the court said:

"The right extended to the carrier to limit its liability must be exercised in the manner prescribed."

"In the absence of a bill of lading the rights of the shipper and the duties of the carrier are to be determined by the common law. 6 Cyc., page 417."

"Where a shipment is tendered a carrier upon which its tariffs provide for the application of alternative rates dependent upon value thereof, the duty rests upon the agent of the carrier to call attention to the shipper to the different rates and secure his signature to a proper bill of lading. Harmon & Co. v. N. P. Ry. Co., 33 I. C. C. 370; 25 I. C. C. 422-477."

"To be binding as a part of the contract of shipment the stipulation limiting liability must be embodied in the contract made

at the time the goods are shipped. If without any receipt or bill of lading being issued the goods are accepted by the carrier for transportation the common law liability attaches. Corpus Juris, Vol. 10, Sec. 223, page 177, and authorities cited thereunder."

"As otherwise expressed. Where the shipper does not receive the bill of lading from the carrier limiting its common law liability contemporaneously with the delivery of the goods to the carrier, the carrier assumes the common law liability. Southern R. Co. v. Levy, 144 Ala. 614."

"In Investigation and Suspension Docket, No. 76, 25 I. C. C. 477, the commission says, 'This rule should be so reconstructed as to place upon the carrier the positive duty to first print these conditions, and not require the shippers to write them, and, upon the carrier's agent, the duty to notify the shipper of the alternative rates and present for his signature the necessary bill of lading to secure the desired rate.' "

"In the case of Southern Cotton Oil Co. v. S. Ry. Co., 19 I. C. C. 79, the Commission held that, 'It is the duty of the initial carrier not only to advise the shipper of the lower rates applying in case of release of valuation, but when informed of the shipper's desire to avail himself of such lower rates to obtain the shipper's signature in accordance with the tariffs.' Ricks Sheep Co. v. Oregon Short Line Co., 180 Ill. App. 220; Idaho Sheep Co. v. Oregon Short Line Co., 188 Ill. App. 591; W. H. Alton Piano Co. v. Chicago M. & St. P. Ry. Co., 139 N. W. 743."

"In the case of Bryan v. Louisville & N.

R. Co., in 93 S. E., page 752, the court says: 'We are not unmindful of our own decisions in Davis v. Railroad, 172 N. C., page 209, 90 S. E. 123, and Smith v. Railroad, 162 N. C. 143, in which it is held that it is not essential to a contract of shipment that the carrier issue a bill of lading. We still hold to the principle laid down in those cases to this extent, if a carrier receives goods for shipment in interstate commerce and fails to issue the bill of lading prescribed by the federal law, the carrier is nevertheless liable *for the value of the goods and damage thereto the same extent as if it had issued the bill of lading. The carrier could not be permitted to take advantage of its own negligence in failing to issue it.*'

"The purpose of the amendment of August 9, 1916, as stated in the report of the Senate Committee on Interstate Commerce, was 'to restore the law of full liability as it existed prior to the Carmack Amendment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable, recovery is had for full value or on the basis of full value.' It is clearly the purpose of the Cummins Amendment, as amended, to invalidate all limitations of liability for loss, damage or injury to ordinary live stock caused by the initial carrier to which shipment may be delivered or which may participate in transporting it, notwithstanding any representations or agreement or release as to value. Express Rates. Practices. Accounts and Revenues, 43 I. C. C. 510, 513."

"The plain and unmistakable purpose of the Cummins amendment was to make un-

lawful and void, except as otherwise provided therein, all attempted limitations of liability for loss, damage, or injury to property transported. Williams Co. v. H. & N. Y. T. Co., 48 I. C. 269, 273."

"The only purpose in publishing rates dependent upon the declared or released value of the property transported is to limit the carrier's liability in case of loss or damage to the property. By amendment to section 20 of the Act to regulate commerce approved March 4, 1915, 'any such limitation to be made' was declared to be unlawful and void. It was without respect to the manner or form in which it is sought; provided, however, that under certain conditions the Commission might establish and maintain rates dependent upon the value of the property as stated in writing by the shipper. In the Cummins Amendment, 33 I. C. C. 682, decided May 7, 1915, the Commission said: 'Neither bills of lading or other contracts for carriage should contain any provisions which are so declared to be unlawful and void.' Effective August 9, 1916, that part of Section 20 of the Act which authorized the Commission to establish and maintain rates based upon declared value was amended and the provision that any attempt to limit the carrier's liability should be unlawful and void was modified so that it should not apply to baggage or to property other than ordinary live stock, 'concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.' The order of the

Commission is as follows: 'We can not, in view of the provisions of the law, authorize or sanction such rates upon ordinary live stock; neither can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission.' This decision was followed in Live Stock Classification, 47 I. C. C. 335, and again in Williams Co. v. Hartford & New York Transportation Co., 48 I. C. C. 269, in which the Commission held that the rates complained of which were dependent upon the value of the property, and which the carriers had not been authorized by order of the Commission to maintain, were unlawful. Some carriers have neglected to secure from the Commission authority to maintain such rates or to cancel them from their tariffs. Unnecessary controversies arise as to the charges on property transported thereunder. It is clearly the duty of every carrier to secure from the Commission authority for the maintenance of such rates or to eliminate them from its classification and rate schedules. The Commission expects that each carrier will give this matter prompt and careful attention. In the matter of rates dependent upon the declared or released value of property. Order of I. C. C. April 6, 1918."

"While the rule of the lesser recovery based upon lesser rates, when the shipper has been given the option of higher recovery upon paying a higher rate has been held binding upon the shipper so long as the published tariff remains in force, this court has not held a bill of lading containing a limitation against liability for loss caused by the carrier's negligence, such as is here involved, to be conclusive of the shipper's

right to recover. In the previous decisions of this court upon the subject it has been said that the limited valuation for which a recovery may be had does not permit the carrier to defeat recovery because of losses arising from its own negligence, but serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service."

"On cases arising prior to passage of the Cummins amendment, it is held that 'a limitation of liability in consideration of a reduced rate is valid and binding, but the shipper must have been given the option to ship at unrestricted liability. In other words, the mere fact that the carrier has filed a tariff providing for limited liability will not of itself make such rate valid, unless it is also shown that the shipper had the option of paying a higher rate, under which the carrier would transport the goods at unrestricted liability. Then, if it is shown that the shipper voluntarily elected to use the lower rate, he must be held to be bound by his choice.' Boston & M. R. R. v. Piper, 38 Sup. Ct. 354, 246 U. S. 439, 62 L. Ed. 820.

See also in the Consolidated Classification case, Vol. 54, I. C. C. Rep. page 66-67.

We especially call the court's attention to the case in the matter of Bill of Lading reported in 52 I. C. C. Reports, page 676, in which the Commission made an exhaustive review of the law under the Carmack and Cummins Amendment.

"In many cases, from the decision on Hart v. Pennsylvania R. Co., 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151, decided in

1884, to Boston & M. R. Co. v. Piper, 246 U. S. 439, 62 L. ed. 820, 38 Sup. Ct. Rep. 354, Ann. Cas. 1918 E, 469, decided in 1918, it has been declared to be the settled Federal law that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property."

Union Pacific R. R. Co. v. Burke, 255 U. S. 317.

"We have held that a rate dependent upon the actual value of the shipment is unlawful, because the carrier cannot know that value except as it is declared by the shipper."

Consolidated Classification Case, I. C. C. Rep. Vol. 54, p. 67.

On page 19 of the petitioner's brief, the following is stated:

"The plaintiff introduced said contract of carriage in evidence as measuring the rights and liabilities of the parties, relative to such shipment, and must be bound by all of its terms and conditions."

This is not true. The plaintiff introduced the said receipt for the purpose of showing that he did not measure his rights and the liabilities of the carrier relative to the shipment by it, and to further show that the carrier had not complied with the terms and conditions of the Second

Cummins Amendment or of the Uniform Express Receipt authorized by the Interstate Commerce Commission. We respectfully call the attention of the court to the fact that the authorities cited on pages 13, 14, 15, 16, 17 and 18 of petitioner's brief, are all cases in which the contract bill of lading or express receipt was a valid and legal contract and not one that was void, unlawful and unauthorized, as is the receipt given in the case at bar, and therefore the authorities so cited by the petitioner are inapplicable.

When the case was tried in the Circuit Court of Kanawha County the petitioner relied wholly and solely, in order to limit its liability, upon the Uniform Express Receipt which was authorized by the Interstate Commerce Commission on the 2nd day of April A. D. 1917, to certain express companies of which the petitioner was not one. (See petitioner's Special Plea in Record, p. 11-12).

> "A shipper receiving a bill of lading is conclusively presumed to have read it and to have acquiesced in its terms in the absence of fraud, imposition or mistake, in so far as the provisions therein contained are lawful and not opposed to public policy."
>
> Corpus Juris, Vol. 10, p. 194, Sec. 252; Cox. Central Vermont Railroad, 170 Mass. 129.

> "While legal conditions and limitations in a railroad company's bill of lading the form of which was duly filed with the Interstate Commerce Commission as part of its tariffs are binding until changed by that body, illegal conditions and limitations are void though so filed."
>
> Boston & M. R. R. v. Piper, 246 U. S. 439.

It will be noted that the language above quoted, in Cox v. Central Vermont Railroad, is that the bill of lading is conclusively presumed to have been acquiesced in in its terms "in the absence of fraud, imposition or mistake in so far as the provisions therein contained are lawful and not opposed to public policy."

To be charitable let us say that this receipt was given to Lindenburg by mistake, and if it is true that when the receipt was so given to Lindenburg the Express Company had in its possession the uniform receipt as prescribed by the Interstate Commerce Commission and had been authorized to give a rate depending upon value, then surely we would be more than liberal to simply term the receipt given Lindenburg a mistake.

Even a casual examination of the receipt or bill of lading so given discloses that it fails to comply with a single provision of the Second Cummins Amendment and the rules and regulations adopted thereunder by the Commission.

To begin with, the receipt limits the liability of the company only to the nearest point of destination reached by it; that, we assume, means from its office in Indianapolis to the railroad station where it was delivered, we assume, to some railroad. The receipt then specifically states that the company will not be liable except as forwarders only, nor shall the company be liable for any default or negligence by any person or corporation or association to whom the said company may deliver the property, for the performance of any act or duty in respect thereto, and expressly provides that any company, corporation or association to which the packages should be delivered, would be regarded, deemed and agreed to be the agents of the shipper. Going further, it expressly provides that the express company relies upon the vari-

ous railroad and steamboat lines of the country for its means of transportations, and stipulates that it will not be liable for any loss or damage caused by the detention of any train, steamboat or other vehicle, nor by the negligence or default of any railroad company, train, steamboat, or any other transporting line who receive or forward the said property.

So that it is clearly seen that this receipt so given to Lindenburg must necessarily be absolutely void and of no force and effect and contrary to all the provisions in the Cummins Act, and the regulations made thereunder by the Commission, consequently a direct violation of the law then in force and necessarily against public policy.

It has been repeatedly held by this court under the Carmack Act that both the common carrier and the shipper are conclusively presumed to know the contents of the law, rules and regulations governing shipments, and that when a proper bill of lading is delivered to the shipper, received and assented to by him, it is a binding contract. This, of course, presupposes and is so decided on the assumption that the bill of lading properly and fairly stated the conditions, rates and regulations under the then existing law or statute governing the shipment that is being made. A proper bill of lading or receipt under the Carmack Act stipulates and agrees to carry the goods from the point of shipment to the point of delivery, and the carrier under the act is held to make such delivery, and if at reduced or other rate, the complete carriage constitutes one of the considerations following from carrier to shipper.

But the receipt given in this case undertakes to do no such thing, and there is no consideration passing to the shipper for reduced rate if he, the shipper, is held and strictly bound by the receipt given, because the receipt

and rules given Lindenburg if the goods are damaged or lost he has to look to the particular carrier, railroad, steamboat or other transportation line that then was transporting the goods, because the carrier giving this receipt only agreed to be liable on its own line, and again if the receipt is good and binding on the shipper, in all probability he could not have recovered even the limited liability provided for in the receipt, as he would have been unable to prove what particular railroad or carrier damaged or destroyed the goods, and it is beyond us to understand how the petitioners can claim that a preference would be given to this shipper, or that a preference would be given this shipper above other shippers if he were allowed to claim his full value for loss. A proper bill of lading is to protect both shipper and carrier alike under the then existing law, and unless the bill of lading strictly conforms to the law in all its different phases it can necessarily be of no force and effect, as it is the law which is binding and not a bill of lading or receipt. A receipt or bill of lading is simply supposed to embody a proper interpretation of the salient requirements of the law, and unless it does so it can be of no force and effect as between the shipper and the carrier, and while both of them are presumed to know the law and the shipping rates in effect under the law, and the carrier issues a bill of lading without complying with a single provision of the law, containing a full mis-statement of what the law really is, and the shipper takes this bill of lading or receipt, then by perforce of circumstances this presumption, we insist, is rebutted then and there.

If the receipt or bill of lading given to Lindenburg, the respondent, is held by this court to be a binding contract on the shipper, then the provisions of the Carmack Act, and Second Cummins Amendment and the First

Cummins Amendment are of absolutely no force or effect, and all that any carrier would need do to avoid the law as it exists under the Second Cummins Amendment would be to issue a receipt in form and in effect as the one given Lindenburg, and there would be no penalty or liability of any kind except the limited liability mentioned in the receipt, which limited liability could not be recovered from the initial carrier unless the damage was proven to have occurred on its particular line through *gross negligence or fraud.*

SECOND: Under the Second Cummins Amendment it is necessary that the carrier be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, and that any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto.

We submit that the foregoing is a condition precedent to the right of the carrier to limit its liability, and that regardless of the fact that it might have its tariffs and schedules filed with the Interstate Commerce Commission and actually charging the rates therein specified, and the Interstate Commerce Commission has repeatedly held that unless the carrier has been specifically authorized or required by it to establish and maintain rates based upon value, that such rates are unlawful and void.

> "By the Second Cummins Amendment, the provisions of the first Cummins Amendment, which invalidated all limitations of the carrier's liability for loss, damage or injury to property transported, were made inapplicable to baggage and to property except

ordinary live stock, as to which 'the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.' In connection with the quoted exception, the Commission was empowered 'to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable, under the circumstances and conditions surrounding the transportation.' It is thus seen that the Second Cummins Amendment placed rates and ratings dependent upon the value 'declared in writing as the released value of the property' in the same category. Both are unlawful until expressly authorized or required by the Commission. Silk Assn. of America v. Penn. R. R., 50 I. C. C. 50, 51."

"In Williams Co. v. Hartford & New York Transportation Co., 48 I. C. C. 269, in which the Commission held that the rates complained of which were dependent upon the value of the property, and which the carriers had not been authorized by order of the Commission to maintain, were unlawful. Some carriers have neglected to secure from the Commission authority to maintain such rates or to cancel them from their tariffs. Unnecessary controversies arise as to the charges on property transported thereunder. It is clearly the duty of every carrier to secure from the Commission authority for the maintenance of such rates or to eliminate them from its classification and rate schedules. The Commission expects that each carrier will give this matter prompt and

careful attention. In the matter of rates dependent upon the declared or released value of the property. Order of I. C. C. April 6, 1918."

"In the Cummins Amendment, 33 I. C. C. 682, decided May 7, 1915, the Commission said: 'Neither bills of lading or other contracts for carriage should contain any provisions which are so declared to be unlawful and void.' Effective August 9, 1916, that part of Section 20 of the Act which authorized the Commission to establish and maintain rates based upon declared value was amended and the provision that any attempt to limit the carrier's liability should be unlawful and void was modified so it should not apply to baggage or to property, other than ordinary live stock, 'concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.' The order of the Commission is as follows: 'We can not, in view of the provisions of the law, authorize or sanction such rates upon ordinary live stock; neither can they lawfully be maintained upon any other character of traffic except under authorization duly granted by the Commission.' This decision was followed in Live Stock Commission, 47 I. C. C. 335."

"The law prohibits all limitations upon the carrier's liability for the full loss, damage or injury caused by it to property trans-

ported by it, and also all attempts to so limit liability in any form or manner, except when rates dependent upon the value declared in writing by the shipper, or agreed to in writing by the shipper as the released value, are authorized by us. We have held that a rate dependent upon the actual value of the shipment is unlawful, because the carrier cannot know that value except as it is declared by the shipper. The ratings determine the rates and are therefore governed by the same rule of law. There are commodities as to which rates and ratings dependent upon declared or released values are proper and desirable. The declaration in the release limits the liability of the carrier to the sum so declared or agreed to. The provisions of the schedule containing such rates or ratings must be clear and in lawful form. The rate or rating must have been authorized or ordered by us. It must be stated as dependent upon the value declared in writing by the shipper, or upon the released value agreed to in writing by the shipper. There can be no such thing as a 'declared released value.' Consolidated Classification Case, I. C. C. Vol. 54, p. 66-67.

"At common law a common carrier is liable for any loss and damage, except that arising from act of God, the public enemy, the act of the shipper, operation of law, or the inherent vice or nature of the goods transported. But under the common law this liability, except for negligence or misconduct, can by contract be limited, and it has in the past been the general practice of carriers to effect such limitation, usually by provisions in the bill of lading. In our opinion all such contract limitations of common law liability in respect to ordinary live

> stock are now prohibited in interstate rail traffic by the Cummins amendment to the act to regulate commerce, and with respect to other commodities they are lawful, under this amendment, only to the extent that by our order a carrier may be expressly authorized or required to establish and maintain rates dependent upon values declared or agreed upon in writing by the shipper." I. C. C. Vol. 56, p. 482.
>
> Gold Hunter Mining Co. v. Director General, I. C. C. Vol. 63, p. 241.
>
> "In Western Assurance Co. v. Wells, Fargo & Co. (Minn. 1919), 173 N. W. 402, the court held the express company to liability for the full value, $1,547.99, of three fur coats, value not marked on the box nor stated to the agent, because it was not shown the company had obtained by order of the Commission the right to adopt alternative rates based on declared or stated values."

As before stated, we believe that it is a condition precedent for the petitioner to have been specifically authorized by order of the Interstate Commerce Commission to establish and maintain rates based upon value, and nowhere in this record is it disclosed that the petitioner had such authorization. It is true that the petitioner proved that it had certain rates based upon value filed with the Interstate Commerce Commission and that they contained and set forth a form of receipt authorized by the said Commission on April 2nd, 1917, but nowhere does the record show that they were authorized to maintain the same, and the exhibits filed by the petitioner show that certain express companies, of which the petitioner is not one, were authorized to maintain rates

based upon value and authorized the uniform express receipt (Record, P. 15-20), and certainly it cannot be contended that because certain other express companies were authorized to maintain rates based upon value that this petitioner was, and the fact that it had the rates filed with the Interstate Commerce Commission and were charging said rates, cannot nullify the express provision of the Second Cummins Amendment relative to the specific authorization so to do, as the Commission in the Williams Company v. Hartford & New York Transportation Co., 48 I. C. C. 269, stated a number of the carriers had rates based upon value filed with the Commission and were charging such rates; still the rates were unlawful, and they sent out a circular to the various carriers to come in and receive such authorization or to eliminate them from their classifications and rate schedules.

The petitioner in their brief, on page 13, cite the case of Cincinnati & Texas Pacific Railroad v. Rankin, 241 U. S. 319, for the proposition that the presumption is that the carrier has complied with all of the requirements of the statutes or become subject to heavy penalties. This case was decided under the Carmack Act, and under it, it was not necessary to have the authorization of the Interstate Commerce Commission to maintain rates based on value. The only thing necessary under the Carmack Act was to have same filed with the Commission, but where there is a condition precedent such as on the Second Cummins Amendment to their limiting their liability, then it seems to us that there can be no presumption but that they must comply strictly with the letter of the statute and especially of the said condition precedent and must prove it before they can have the benefit of the limited liability.

It will be noted in the Cummins Amendment that the

carrier is liable notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any receipt, bill of lading or in any contract, rule, regulation, or in any tariffs filed with the Interstate Commerce Commission. So that the contention of the petitioner that because its tariffs, rates and schedules were filed with the Interstate Commerce Commission they were legal, is not tenable, because the Second Cummins Amendment particularly states that the filing of the rates and schedules with the Interstate Commerce Commission do not legalize the rates or make them lawful, but that they can only be legalized or made lawful by the carrier being specifically authorized or directed by the Interstate Commerce Commission to maintain the same. So that it is clear that it is the authorization by the Interstate Commerce Commission which legalizes and makes lawful the rates based upon value, and not the filing of the same with the Interstate Commerce Commission and publishing the same and charging the shipper with the same. See case of National Confectioners Association v. A. & R. R. R. Co., 49 I. C. C. Rep. page 579; also J. B. Williams Co. v. Hartford & N. Y. Transportation Co. et al. 48 I. C. C. Rep. 269; Buckeye Cotton Oil Co. v. Gulf, Mobile & Northern Rly. Co., 50 I. C. C. Rep. page 32.

THIRD: The Second Cummins Amendment requires that in order for the carrier to charge rates dependent upon value, the value must be declared in writing by the shipper or agreed upon in writing as the released value of the property, and we believe that there can be no stronger or clearer construction of that portion of the Second Cummins Amendment than the opinion of Judge Poffenbarger in the case at bar (Record p. 37-8). Also

in a well considered case, American Railway Express Co. v. Galt (Miss., Feb. 1922), 90 So. 597.

> "holding that even if the classification and tariffs be treated as authorized by the Commission, and the low rate based on a $50 valuation has been paid, yet full actual value is to be recovered where the blank space in the receipt for declaration of value has not been filled in. After quoting from the Lindenburg case, which is the case at bar, the court says: 'It appears from the statute that it was the purpose of Congress to afford the shipper full value for his loss, unless he chose to take the initiative in the manner laid down by the statute,—that is, by declaring a released value in writing. It is left entirely optional with the shipper; the carrier has nothing to do with the matter, other than to accept the shipper's declaration of released value in writing. The purpose of the statute is to give the shipper the active conscious choosing whether he will pay the lower rate and recover less than full value in case of loss or damage. If he so chooses he sets down in writing in the receipt the released value. .On the other hand, if he is silent, either from choice or ignorance, he pays the higher rate, which carries with it the right to recover full compensation for his loss.' "

The counsel for the petitioner dwells at large on the fact that in the opinion in the case at bar the court decided that it was necessary for the shipper to sign the receipt, and in answer to that we respectfully call the court's attention to the uniform express receipt (Record, p ——), and to that portion of it which is as follows:

"UNIFORM EXPRESS RECEIPT.

---------- Express Company.

The Company will not pay over $50.00, in case of loss, or 50 cents per pound, actual weight, for any shipment in excess of 100 pounds, unless a greater value is declared and charges for such greater value paid.

Non-Negotiable Receipt.

----------, --------, 191 .

Received from ---------- subject to the Classification and Tariffs in effect on the date hereof, ---- value herein declared by shipper to be ---------- Dollars.

Consigned to ----------, at ----------.

Charges, -------.

Which the Company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt.

----------,

For the Company.

----------,

Shipper."

Surely nothing could be clearer that the signature of the shipper was necessary when the Interstate Commerce Commission authorized the uniform express receipt and used the language "which the company agrees to carry upon the terms and conditions printed on the back hereof, to which the shipper agrees, and as evidence thereof accepts and signs this receipt". It seems to us that that of necessity must be the construction of the Second Cummins Amendment and of the uniform express receipt, and while the Act itself does not state that the shipper must sign the receipt, the Act does authorize the

Commission "to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation," and the Interstate Commerce Commission, upon the petition of various express companies who prepared this uniform express receipt authorized its use, and we believe that the petitioner itself believed that the true construction of the Act and of the uniform express receipt required the signature of the shipper to the receipt, as is shown in the case of Viscoose Company v. American Railway Express Co., Vol. 62, I. C. C. Rep. p. 33, wherein the rules of the American Railway Express Company, who is the petitioner in the case at bar, relative to declared or released value says:

> "Receipts to show value: Shippers must be required to state the nature of the shipments and to declare the value thereof (except on ordinary live stock), which value must be inserted in 'Value' space on the receipt and marked on the package. Shipper's declaration of value may be made by notation, 'Not exceeding $50.00' or 'Not exceeding $50.00 or 50c. per pound, actual weight.' * * * If shipper or his representative declines to declare value and sign receipt or agreement, the shipment must be refused."
>
> "Where a shipment is tendered a carrier upon which its tariffs provide for the application of allternative rates dependent upon value thereof, and duty rests upon the agent of the carrier to call attention to the shipper to the different rates and secure his signature to a proper bill of lading." Harmon & Co. v. N. P. Ry. Co., 33 I. C. C. 370; 25 I. C. C. 442-477.

"In Investigation and Suspension Docket No. 76, 25 I. C. C. 477, the commission says, 'This rule should be so reconstructed as to place upon the carrier the positive duty to first print these conditions, and not require the shippers to write them, and, upon the carrier's agent, the duty to notify the shipper of the alternative rates and present for his signature the necessary bill of lading to secure the desired rate.'"

"In the case of Southern Cotton Oil Co. v. S. Ry. Co., 19 I. C. C. 79, the Commission held that, 'It is the duty of the initial carrier not only to advise the shipper of the lower rates applying in case of release of valuation, but when informed of the shipper's desire to avail himself of such lower rates to obtain the shipper's signature in accordance with the tariffs.' Ricks Sheep Co., 188 Ill. App. 591; W. H. Alton Piano 220; Idaho Sheep Co. v. Oregon Short Line Co. 188 Ill. App. 591; W. H. Alton Piano Co. v. Chicago M. & St. P. Ry. Co., 139 N. W. 743."

The petitioner in its brief, on page 18 thereof, cites the case of Tribble vs. Southern Express Company as authority for its position that the uniform express receipt does not have to be signed. Upon an examination of this case it will be found that the decision was based upon the cases of New York Central & Hudson River R. R. Co. vs. Beaham, 242 U. S. 148, and American Express Company vs. United States Horse Shoe Company, 244 U. S. 58, and we respectfully call the attention of the court to the fact that these cases were decided under the Carmack Amendment. We also call the attention of the court to the fact that all the other cases decided by the Supreme

Court of the United States cited by petitioner in its brief were decided under the Carmack Act, with the exception of the case of Union Pacific Railroad Company v. Burke, 255 U. S. 317, which said case we submit is in favor of the respondent.

"FOURTH:

"CAUSES LEADING TO ENACTMENT OF FIRST CUMMINS AMENDMENT—AGREED VALUATION CLAUSES AND NOTICE OF LOSS. In construing the Carmack Amendment as originally enacted, the federal Supreme Court in a series of cases, beginning in 1913 with Adams Exp. Co. v. Croninger, held that while a common carrier could not exempt itself from liability for its own negligence or that of its servants, it might, however, by a fair, open, just and reasonable agreement, limit the amount recoverable by a shipper in case of loss or damage to an agreed valuation, made for the purpose of obtaining the lower of two or more rates proportioned to the amount of the risk. When, therefore, the bill of lading and the tariffs of a carrier contained two rates based on valuation and goods were shipped at the lower value in order to secure the lower rate, the Supreme Court, in many cases prior to the Cummins Amendment, held that the valuation so declared and fixed in the tariffs controlled when the carrier was sued for loss or damage, as the shipper was conclusively presumed to have knowledge of the schedules on file with the Commission.

"In enforcing the provisions of the Carmack amendment as originally enacted, the courts also upheld the validity of stipulations in the shipping contracts providing for a written notice of claims for damages

to be given the carrier within a designated time. For example, a livestock contract which provided that claims for damages should be presented within five days from the time the stock were removed from the cars, was held to be valid and enforceable as to an interstate shipment. Similarly, provisions in bills of lading requiring that suits for loss or damage be brought within a designated time shorter than the status of limitation, were upheld.

"The purpose of Congress in the enactment of the Cummins amendment was to destroy, in a measure and to the extent indicated in the succeeding paragraph, the effect of these decisions in limiting and qualifying the rights of shippers when suing for loss or damage to interstate shipments.

"OBJECT AND PURPOSE OF CONGRESS IN ENACTING SECOND CUMMINS AMENDMENT OF 1916. The purpose and object of Congress in passing the second Cummins Amendment were thus stated by the Senate Committee on Interstate Commerce in its report accompanying the bill. 'The proposed legislation is an amendment of the act of March 4, 1915, commonly called the Cummins Amendment. That amendment was designed to impose upon carriers liability for full actual loss, damage, or injury, to property transported notwithstanding any limitation of liability or recovery or representation or agreement as to value. The Cummins Amendment as reported by this committee contained a proviso making certain exceptions in its application. The proviso reported by the committee was stricken out on the floor of the Senate and another substituted in its stead and in that form became a law.

"'The construction put upon the proviso by the Interstate Commerce Commission has resulted in some vexatious requirements insisted upon by carriers and in some injustice. For instance, it has been held by the commission that under the proviso the carrier may compel the shipper to state the value of the goods tendered for shipment and that if the true value is not stated the shipper is liable to criminal prosecution under section 10 of the act to regulate commerce. The committee does not agree with the commission in the interpretation so placed upon the proviso, but there is no way in which to remedy the matter except to make the intent of Congress so clear that it is impossible to misunderstand it. Further, the commission has held that baggage carried on passenger trains upon the ticket of a passenger is within the terms of the law. Whether this construction is correct or incorrect, it is palpable that baggage so transported on a passenger fare ought not to be subject to the rule which controls ordinary freight, and in the bill now reported it is excepted in express terms.'

"'The bill herewith reported has nothing whatever to do with rates on transportation; that is to say, it does not prescribe the compensation which carriers may charge for service. It re-enacts the Cummins Amendment with the modifications above suggested. Its purpose is to restore the law of full liability as it existed prior to the Carmack Amendment of 1906, so that when property is lost or damaged in the course of transportation under such circumstances as to make the carrier liable recovery is had for full value or on the basis of full value. From this general rule there is excepted, first, baggage carried on passenger trains. This

is done for obvious reasons. Second, other property except ordinary live stock, with respect to which the Interstate Commerce Commission has fixed or authorized affirmatively a rate dependent upon value, either an agreed or a released value. When the commission has fixed or authorized such a rate the value agreed upon or released and necessarily stated by the shipper is not to be held as a representation of value under section 10 of the interstate commerce act.'

"LIMITATIONS OF LIABILITY VALID AS TO PROPERTY OTHER THAN LIVE STOCK, WHEN. Prior to the enactment of Cummins amendment, a limitation of a carrier's liability for loss or damage even when due to negligence, to a valuation agreed upon for the purpose of determining which of two alternative lawful rates applied to a particular shipment was valid under the Carmack amendment as to all classes, of freight, express and baggage. As shown in the foregoing paragraph, no such limitations, since the enactment of the Cummins amendments, are invalid as to ordinary live stock, which includes cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses.

"But as to all other property shipped in interstate commerce and to adjacent foreign countries, such limitations are still valid even under the Cummins amendments, when *expressly authorized by the Interstate Commerce Commission.* For the statute declares that the provisions of the Cummins amendments making the carriers liable for full actual loss, damage or injury shall not apply to baggage carried on passenger trains

or boats, or trains or boats carrying passengers and to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Intestate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property; in which case such declaration or agreement shall have the effect of limiting liability and recovery to an amount not exceeding the value so declared or released. The statute further requires any tariff schedule which may be filed with the Interstate Commerce Commission pursuant to such order, to contain specific refence thereto, and may also establish rates varying with the value so declared or agreed upon. The Interstate Commerce Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values, would, in its opinion, be just and reasonable under the circumstances and conditions concerning the transportation. Roberts Fed. Liabilities of Carriers, Vol. 1 pp. 558-9, 561-562, 567-568."

FIFTH: To allow the respondent to recover the full loss and damage as proven in the case at bar is not in conflict with the provisions of the Interstate Commerce Act prohibiting undue preferences and unjust discrimination for the reasons given by Judge Poffenbarger in the opinion in the case at bar (Record, P.-------).

It is, therefore, respectfully submitted that the judgment of the Supreme Court of Appeals of West Virginia,

made and entered herein, is plainly correct and should be affirmed.

Respectfully submitted,

MORGAN OWEN,

E. B. DYER,

Attorneys for Respondent
A. J. Lindenburg.

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 138.

AMERICAN RAILWAY EXPRESS COMPANY, A CORPORATION,
Petitioner,

vs.

A. J. LINDENBURG,
Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

REPLY BRIEF ON BEHALF OF THE AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER.

The Evening Post Job Printing Office, Inc., 184 Fulton St., New York, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 138.

AMERICAN RAILWAY EXPRESS COMPANY, a corporation,
Petitioner,
vs.
A. J. LINDENBURG,
Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

REPLY BRIEF ON BEHALF OF THE AMERICAN RAILWAY EXPRESS COMPANY, PETITIONER.

It seems proper to file a reply brief in this case in view of the contentions advanced in the respondent's brief that, first, the petitioner has not been authorized by order of the Interstate Commerce Commission to establish and maintain rates based upon value and, second, that the respondent introduced the receipt in evidence for the purpose of showing that he did not measure his rights and the liabilities of the carrier relative to the shipment by it, and to further show that the carrier had not complied

with the terms and conditions of the second Cummins' Amendment or of the uniform express receipt authorized by the Interstate Commerce Commission. Such arguments are not only not sustained by the record but are in direct conflict with it.

Addressing ourselves to the first contention:—The order of the trial court recites (Transcript of Record, p. 10):

> "* * * that at the time of the delivery and transportation of the said shipment there was in effect a tariff of the defendant company governing transportation from Indianapolis, Indiana, to Charleston, West Virginia, duly published and filed with the Interstate Commerce Commission, at Washington, District of Columbia, which tariff contained and set forth a form of receipt authorized by the Interstate Commerce Commission, April 2, 1917, by supplemental order No. 18, and the defendant thereupon introduced in evidence a certified copy of said order, marked 'Defendant's Exhibit 1'; in effect on the line of the defendant company between Indianapolis, Indiana, and Charleston, West Virginia, at the time of the transportation and shipment in question; that the proper charge upon the total shipment of the defendant at the time the same moved from Indianapolis, Indiana, to Charleston, West Virginia, was $1.76 per hundred pounds and 42¢ for a package of 10 pounds; that is to say for the transportation of said property at the time and between the points mentioned and at a valuation not exceeding 50¢ per pound; that the amount charged to and collected from the plaintiff on account of transportation of all of said property was the following; for a certain trunk weighing 200 pounds, delivered on the 24th of August, $3.52, and 18¢ war tax; for a certain trunk weighing 100 pounds, delivered on the 22nd of August, $1.76 and 9¢ war tax; and for the package, weighing 10 pounds, delivered August 6th, 42¢ and 3¢ war tax; that the charges collected on the shipment were normal express charges for transportation and no valuation charges were included therein upon any part of the shipment."

The Defendant's Exhibit No. 1, referred to in the preceding order of the court is a copy of an order of the Interstate Commerce Commission issued on the 2nd day of April, 1917, In the Matter of Express Rates, Practices, Accounts and Revenues, Released Rates in which the Commission after reciting that on October 10, 1916, it had entered upon an investigation concerning the propriety of the issuance of an order authorizing the maintenance of express rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, authorized the establishment of such rates and to carry out the terms of such order prescribed a new form of uniform express receipt for use throughout the United States (a copy of this receipt appears at p. 17 of the Transcript of Record). It is significant that this form provides a blank for the insertion for the name of the express company by which it is to be used.

The order was not intended to be directed to specific companies but was for general application in the express transportation business by such companies as should bring themselves within the requirements of the Commission by the filing and publication of proper tariffs. In the opinion of the Commission, written in connection with the issuance of the order, 43 I. C. C., page 510, the Commission concludes with the statement, "an order will be entered authorizing the maintenance of existing express rates dependent upon the declared or released property transported, except ordinary live stock, also authorizing the form of express receipt to be used".

The form of express receipt thus prescribed by the Interstate Commerce Commission is the one introduced in evidence by the defendant and which the trial court found was in effect between the points of origin and destination of the shipment involved in this case on the date it moved and at that time duly published and filed with the Interstate Commerce Commission at Washing-

ton. The finding of the trial court to the effect that the said tariff providing alternative rates based upon the value of the property declared, was in effect, was expressly approved by the Supreme Court of Appeals of West Virginia in its opinion where it stated by Poffenbarger, *J.*, at pages 37, 38:

> "Under the authority thus conferred upon it, the Interstate Commerce Commission has authorized all property other than ordinary live stock, to be carried at rates dependent upon such declared or agreed values and limited liability. *That the property involved here could have been so carried is beyond doubt,* and it also falls within the class authorized to be carried on a value not exceeding $50.00 for a shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for a shipment in excess of 100 pounds, unless a greater value is declared or agreed upon in writing. (Italics ours.)
>
> For some reason presumptively found in necessity or expediency, the statute requires the declaration or agreement as to value to be made in writing, or rather does not authorize carriage under limited liability, nor the Commission to provide for it, except upon a written declaration or agreement as to value. In its prescription of the uniform receipt, the Commission has observed this requirement, by providing spaces for the value and the signature of the shipper. It has also interpreted the statute as requiring the carrier to give the shipper an opportunity to elect what value he shall declare, whether that specified in the classification for use in the absence of a declaration of any other, or some higher valuation imposing upon him a higher rate for transportation. In other words, the receipt contemplates a declaration of value by the shipper or an agreement with him upon the value in every instance. This seems to be the only interpretation of which the statute is fairly susceptible. It does not authorize either the Commission or the carrier to fix values. It says property may be authorized to be carried upon 'rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.' "

"As, in this instance, the carrier did not take from the shipper a written declaration of value nor a written agreement as to value signed by him, it failed to place itself within the requirements of the statute and the regulations of the Interstate Commerce Commission prescribed thereunder. In other words, it did not comply with the conditions precedent to its right to carry the property under a limitation of liability. It should have given him a receipt specifying a value fixed by himself, *and evidenced by his signature.* In doing so, it would have given him the option as to value contemplated by the law. In failing to do so, it denied him that option. Besides, it neglected to avail itself of the right conditionally conferred upon it by the statute and the regulations, by its failure to take his written declaration or agreement as to value. *A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him.*" (Italics ours.)

* * * * * *

"To effectuate this purpose and adequately guarantee such right to him, it has been deemed necessary to require the carrier, in every instance, to allow him an opportunity to elect what value he will place upon his property, by taking his statement as to it, writing it in the receipt *and requiring him to sign it.* Imposition of this duty upon both parties prevents the carrier from fixing the value itself in the great majority of cases, as it did under the 'First Cummins Amendment.' Hence, the provision is a vital one and stands upon considerations of very great importance. (Italics ours.)

Upon these principles and conclusions the judgment complained of will be affirmed."

From this language it clearly appears that there was no thought in the mind of the Court of Appeals of West Virginia, of any failure of observance on the part of the petitioner to secure the authority of the Interstate Commerce Commission to maintain rates dependent upon value or of lack of proof of such fact in this case, but that its decision rested solely on the point that *the law*

required a signature by the shipper to constitute a valid agreement by him.

It is established in this case that the petitioner had in effect at the time this shipment was made a system of rates dependent upon value. Having been filed and being in effect, they must be accepted and enforced by carrier and shipper alike. The published tariff in effect is to be treated as though it were a statute binding upon the carrier and shipper. *Pennsylvania Railroad* v. *International Coal Mining Co.,* 230 U. S. 194, 197. Neither the carrier nor the shipper lawfully could escape or deviate from such published and filed tariffs. *Georgia, Florida and Alabama Railway Co.* vs. *Blish Milling Co.,* 241 U. S. page 190. *Western Union Telegraph Co.* v. *Esteve Bros. & Co.,* 256 U. S. 566. In the latter case, this Court quotes with approval, the following from *Boston & Maine Railway Co.* vs. *Hooker,* 233 U. S. 97, page 121:

> "If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in Interstate Commerce."

Had these rates not been authorized by the Interstate Commerce Commission, they would have been unlawful. The presumption, therefore, is that the maintenance of such rates had been authorized by the Interstate Commerce Commission, and in the absence of any proof to the contrary such presumption is conclusive. *Cincinnati and Texas Pacific Railway* v. *Rankin,* 241 U. S. 319, 327.

As to the second contention:—The record shows that the receipt and form of receipt introduced in evidence by the respondent as his Exhibits Nos. 1 and 2, were so introduced without qualification or restriction or reservation whatsoever as to the purpose of introduction (Transcript of Record, p. 9).

The respondent having introduced the receipt in evidence is bound by all of its valid terms and conditions. In our main brief, we refer to the case of *Bates* v. *Wier*, 105 N. Y. Supp., page 785, in which the Court specifically held that under such circumstances the plaintiff must accept the provisions of the receipt *in toto*, if at all. The same principle is announced in the case of *Inman* v. *Seaboard Air Line*, 159 Federal Reporter, 960.

We believe it is not improper for us to point out certain errors in the respondent's brief, doubtless due to inadvertence but, nevertheless material and misleading. Certain quotations have been found to be inaccurate, for instance, a quotation from Corpus Juris, Volume 10, page 194, on page 15 of the brief; and another from *Boston & Maine Railway* v. *Piper*, 246 U. S. 239, on same page of the brief. Other quotations cannot be found in the authorities to which they are ascribed and, at least, one other, on page 13, as taken from *Boston & Maine Railway* v. *Piper*, does not appear to be in that case. Again at pages 20 and 21 of the brief, appears what purport to be two extended quotations from authorities which are not named.

Respectfully submitted,

H. S. MARX,
STAIGE DAVIS,
A. M. HARTUNG,
Attorneys for Petitioner, American Railway Express Company.

AMERICAN RAILWAY EXPRESS COMPANY *v.* LINDENBURG.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 138. Argued December 4, 1922.—Decided January 8, 1923.

1. In a proceeding under the Cummins Amendment (amended by Act of August 9, 1916, c. 301, 39 Stat. 441,) the Interstate Commerce Commission authorized various express companies to maintain rates dependent upon declared or agreed values of property shipped and authorized a new form of receipt; and thereafter another express company, not a party to the proceeding mentioned in the Commission's order, published and filed with the Commission a tariff referring to the order and containing the form of receipt, and put the tariff in effect. *Held* that, in the absence of proof to the contrary, it would be presumed that the action of the company was authorized by the Commission. P. 588.
2. A stipulation in an express receipt is not rendered unlawful by the presence of others which are so, but which are separable from it and inapplicable to the shipment in question or to the obligations of the carrier respecting it. P. 589.
3. The Cummins Amendment, in allowing carriers, when expressly authorized by the Interstate Commerce Commission, to "establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value", does not require the signature of the shipper. P. 590.
4. A shipper, by receiving and acting upon an express receipt, for an interstate shipment, signed only by the carrier, assents to its terms, and it thereby becomes the written agreement of the parties. P. 591.
5. And where the terms of the receipt and the carrier's lawful filed schedules show that the charge made was based upon a specified valuation of the goods, by which the carrier's liability was to be limited, the shipper is presumed to have known this, and is estopped from asserting a higher value when goods are damaged in transit. P. 591.

88 W. Va. 435, reversed.

CERTIORARI to a judgment of the Supreme Court of Appeals of West Virginia affirming a judgment against the petitioner in an action against it brought by the respondent to recover for damages to goods shipped.

Mr. A. M. Hartung, with whom *Mr. H. S. Marx* and *Mr. Staige Davis* were on the brief, for petitioner.

Mr. E. B. Dyer and *Mr. Morgan Owen* for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

On July 22, 1918, at Indianapolis, Indiana, respondent caused to be delivered to petitioner two trunks weighing 200 pounds and 100 pounds, respectively, and a package weighing 10 pounds, for transportation to him at Charleston, West Virginia. A receipt was given for the property, which recited that its terms and conditions were agreed to by the shipper. The receipt, among other things, stipulated that in no event "shall this Company be held liable or responsible, nor shall any demand be made upon it beyond the sum of fifty dollars upon any shipment of 100 lbs. or less, and for not exceeding 50 cents per pound upon any shipment weighing more than 100 lbs., and the liability of the Express Company is limited to the value above stated unless the just and true value is declared at time of shipment, and the declared value in excess of the value above specified is paid for, or agreed to be paid for, under this Company's schedule of charges for excess value."

This receipt was produced at the trial and put in evidence by the respondent in support of his action. At the time of the shipment the value of the property was neither stated by the respondent nor demanded by the petitioner. The charges paid were on the basis of the limited liability set forth in the receipt. One of the trunks when delivered

at destination was in bad order, some of the goods therein being damaged and others destroyed. Respondent alleged damages in the sum of $1,500.00. Petitioner answered, admitting liability for $110.00, under the terms of the receipt. The trial court gave judgment for $916.15, which the state appellate court affirmed. 88 W. Va. 439. The case is here on certiorari.

The case is governed by the provisions of the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441. The amendment requires every common carrier receiving property for interstate transportation to issue a receipt or bill of lading, and makes it liable for the full, actual loss, damage or injury to such property caused by it or any connecting carrier participating in the transportation on a through bill of lading, notwithstanding any limitation of liability of the amount of recovery or representation or agreement as to value. Any such attempted limitation is declared to be unlawful and void. Then follows a proviso, which appears in full in the margin,[1] and the question for determination is whether, under the facts, the case is within its terms.

The Interstate Commerce Commission on April 2, 1917, in a proceeding wherein the Adams Express Company and a number of other express companies (but not including

[1] "*Provided, however,* That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or

this petitioner) were parties, made an order in conformity with this proviso, authorizing the express companies to maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property. The basic rate to be established was upon a valuation not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound for any shipment in excess of 100 pounds, the rates to be progressively increased with increased valuations. The express companies were further authorized, after notice, to amend the terms and conditions of the uniform express receipt in accordance with a form prescribed.

The new form, so prescribed, contained a provision to the effect that "in consideration of the rate charged for carrying said property, which is dependent upon the value thereof and is based upon an agreed valuation of not exceeding fifty dollars for any shipment of 100 pounds or less, and not exceeding fifty cents per pound, actual weight, for any shipment in excess of 100 pounds," the shipper agrees, unless a greater value be declared at the time of shipment, that the company shall not be liable in any event for more than these amounts. At the time of the shipment, the evidence shows there was in effect a tariff of petitioner governing transportation between Indianapolis and Charleston, duly published and filed

agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation."

with the Interstate Commerce Commission, setting forth the form of receipt prescribed by the Commission; and that the charges made were in accordance with this tariff. The receipt issued by petitioner, it will be seen, limits the liability of the petitioner, not in the precise words of, but substantially in accordance with, the provision contained in the receipt authorized by the Commission; but it was upon an old form which had been used previous to the order of the Commission and contained some conditions which were contrary to and declared to be void by the Cummins Amendment. Neither the receipt nor any declaration or agreement was signed by respondent or by anyone in his behalf.

The judgment of the state appellate court is made to rest upon the sole ground that petitioner did not take from the shipper a written declaration of value or a written agreement as to value *signed by him*. Respondent here seeks to justify the judgment upon other grounds as well; and these we first consider.

In the first place, it is said that petitioner was never expressly authorized or required by the Interstate Commerce Commission to establish or maintain rates dependent upon declared or agreed values. It is true the order of the Commission, hereinbefore referred to, was made in a proceeding in which petitioner's name did not appear, but petitioner subsequently published and filed with the Commission a tariff, specifically referring to the order of the Commission in that proceeding and containing the form of receipt therein authorized, which tariff was in effect at the time of the shipment, and had been in effect for more than a year prior thereto. The transportation charges were in conformity with the tariff, and the receipt issued, in so far as the limitation of liability is concerned, was in substantial accord with the authorized receipt. The petitioner appears to have proceeded upon the assumption that the publication and filing of the tariff were

authorized by the Commission's order, and there is nothing in the record to indicate that the Commission did not so regard it. A copy of the tariff, certified by the Secretary of the Commission, was put in evidence. If these facts do not warrant the logical inference of a grant of authority, they do afford the basis for a legal presumption to that effect, for, if petitioner was not duly authorized by the Commission, its action in attempting to limit its liability was unlawful, and, as this Court said in *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319, 327:

"It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct."

It is a rule of general application that "where an act is done which can be done legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act." *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 97. See also *New York Central & Hudson River R. R. Co.* v. *Beaham*, 242 U. S. 148, 151; *Young* v. *South Tredegar Iron Co.*, 85 Tenn. 189; *Scottish Commercial Insurance Co.* v. *Plummer*, 70 Me. 540, 544.

In the absence of proof to the contrary, we, therefore, indulge the presumption that in basing its transportation charges upon the values recited in the receipt, the petitioner had due authority.

It is next contended that the receipt which was issued was unlawful and void because it contained conditions forbidden by the Cummins Amendment and prior statutes, the principal condition being a limitation of the carrier's liability to its own routes or lines. But it does not appear

that the shipment in question came within the terms of any of these conditions or that the obligations of petitioner in respect of the matter were in any way affected thereby. Assuming their unlawful character, there is no difficulty in separating them from the condition limiting the liability by the declared valuation. We do not, therefore, deem it necessary to inquire in respect of the nature or extent of these alleged unlawful conditions, since, in any event, their presence would not have the effect of rendering unenforceable the severable, valid provision here relied upon. *McCullough* v. *Virginia*, 172 U. S. 102, 113; *United States* v. *Bradley*, 10 Pet. 343, 360; *Chicago, St. Louis & New Orleans R. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 91. In *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. C. 235, 250, the rule is stated by Willes, J., as follows: "The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but, where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." See also *Cincinnati Packet Co.* v. *Bay*, 200 U. S. 179, 185.

We come now to the point on which the judgment of the state appellate court is grounded. That court held that the petitioner should have given the shipper "a receipt specifying a value fixed by himself, and evidenced by his signature. . . . A writing not signed by him, although specifying value, was not a declaration or agreement in writing by him." 88 W. Va. 439, 443–4.

Neither the statute nor the order of the Commission requires the signature of the shipper. The pertinent words of the statute are: ". . . rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value. . . ." It is not to be supposed that the Commission would attempt to add anything to the substantive requirements of the stat-

ute, and its order does not purport to do so; but the form of receipt which the express companies were authorized to adopt contains a recital to the effect that as evidence of the shipper's agreement to the printed conditions he "accepts and signs this receipt," and a blank space is provided for his signature. Naturally, such signature would be desirable as constituting the most satisfactory evidence of the shipper's agreement, but it is not made a prerequisite without which no agreement will result, and a subsequent report of the Commission on the subject of bills of lading is persuasive evidence that there was no such intention. *In the Matter of Bills of Lading*, 52 I. C. C. 671, 681, where it is said:

"It is sufficient if the shipper accepts the carrier's bill of lading without himself signing it. It becomes binding upon him by his acceptance, he being presumed to know and accept the conditions of the written bill of lading."

The respondent, by receiving and acting upon the receipt, although signed only by the petitioner, assented to its terms and the same thereby became the written agreement of the parties. *McMillan* v. *Michigan, S. & N. I. R. R. Co.*, 16 Mich. 79; *The Henry B. Hyde*, 82 Fed. 681. In the absence of a statutory requirement, signing by the respondent was not essential. *Missouri, Kansas & Texas Ry. Co.* v. *McCann*, 174 U. S. 580, 590; *Inman & Co.* v. *Seaboard Air Line Ry. Co.*, 159 Fed. 960, 966. His signature, to be sure, would have brought into existence additional evidence of the agreement but it was not necessary to give it effect. See *Girard Insurance & Trust Co.* v. *Cooper*, 162 U. S. 529, 543. And his knowledge of its contents will be presumed. *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 427, 431; *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 652, 653, 656. "The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper

that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission." *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 508–509, 510. Having accepted the benefit of the lower rate dependent upon the specified valuation, the respondent is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing. *Hart* v. *Pennsylvania R. R. Co.*, 112 U. S. 331, 340; *Adams Express Co.* v. *Croninger, supra.* In *Kansas City Southern Ry. Co.* v. *Carl, supra*, this Court said: "To permit such a declared valuation to be overthrown by evidence *aliunde* the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies."

The judgment of the state appellate court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

HILL ET AL., EXECUTORS OF HILL, *v.* SMITH.